

87-1241

No. \_\_\_\_\_

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

Supreme Court, U.S.

FILED

JAN 21 1988

JOSEPH F. SPANIOL, JR.  
CLERK

COMMONWEALTH OF PENNSYLVANIA,

Petitioner

v.

UNION GAS COMPANY,

Respondent

PETITION FOR WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE THIRD CIRCUIT

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## QUESTIONS PRESENTED

1. Whether amendments to a definitional section of the Superfund Act, which make no mention of the Eleventh Amendment and which refer to State liability only in narrow circumstances not applicable here, contain the unmistakable expression of Congressional intent necessary to override the Eleventh Amendment.

2. Whether, assuming that the amendments lift Eleventh Amendment protection, the rule that, in Commerce Clause enactments Congress may affect the states' Eleventh Amendment immunity only if States waive their immunity by continuing to operate in the federally regulated sphere, bars Congress from retroactively eliminating Eleventh Amendment protections.

3. Whether Congress' power to override Eleventh Amendment immunity under the Commerce Clause is limited by the States' right to provide vital services without subjecting themselves to federal court jurisdiction, particularly where the events forming the basis for suit occurred long before the federal scheme was enacted.

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COMMONWEALTH OF PENNSYLVANIA,

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OPINIONS BELOW

The second opinion of the Court of Appeals (Pet. App. 1a.-73a.) is reported 832 at 1343 F.2d (1987). The initial opinion of the Court of Appeals (Pet. App. 74a.-138a.) is reported at 792 F.2d 372 (1986). The opinion of the District Court (Pet. App. 139a.- 158a.) is reported at 575 F.Supp. 949 (1983).

JURISDICTION

The judgment of the Court of Appeals was entered on November 3, 1987. Pet. App. 1a. This petition is filed within 90 days of the judgment.

STATUTE INVOLVED

STATE OR LOCAL GOVERNMENT  
LIMITATION -- Paragraph (20) section 101 of CERCLA (defining "owner or operator") is amended as follows:

- 1) Add the following new subparagraph at the end thereof:

"(D) The term 'owner or operator' does not include a unit of State or local government which acquired ownership or control involuntarily through bankruptcy, tax delinquency, abandonment, or other circumstances in which the government involuntarily acquires title by virtue of its function as sovereign. The exclusion provided under this paragraph shall not apply to any

State or local government which has caused or contributed to the release or threatened release of a hazardous substance from the facility, and such a State or local government shall be subject to the provisions of this Act in the same manner and to the same extent, both procedurally and substantively as any nongovernmental entity, including liability under section 107."

- 2) Amend clause (iii) of subparagraph (A) to read as follows: "(iii) in the case of any facility, title or control of which was conveyed due to bankruptcy, foreclosure, tax delinquency, abandonment, or similar means to a unit of State or local government, any person who owned, operated, or otherwise controlled activities at such facility immediately beforehand."

Superfund Amendments and Reauthorization Act of 1986, Pub. L. No. 99-499, §101(b), 100 Stat. 1613 (1986).

## STATEMENT

This case began with a complaint filed in the United States District Court for the Eastern District of Pennsylvania in which the United States sought to recover from Union Gas Co. the costs incurred to clean up coal tar which had seeped into a creek. Pet. App. 10a. Suit was brought pursuant to Sections 104 and 107 of the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA or Superfund), 42 U.S.C. §§9604, 9607. Pet. App. 10a. Union Gas filed third-party claims against the Commonwealth of Pennsylvania and a Pennsylvania municipality, the Borough of Stroudsburg.<sup>1</sup> Pet. App. 10a, 79a.

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<sup>1</sup>The borough is not a party to this appeal. Pet. App. 80a n.3.

The District Court dismissed the claim on Eleventh Amendment grounds<sup>2</sup>. Pet. App. 158a. Initially, the Court of Appeals affirmed (Pet. App. 118a), but following remand from this Court to reconsider the question in light of intervening amendments to CERCLA, the Third Circuit reversed. Pet. App. 73a.

1. The pleadings disclose that predecessors of Union Gas owned and operated a facility which produced coal tar as a byproduct of its operation. Pet. App. 76a-77a. Long after the plant was closed the Commonwealth acquired portions of Union Gas' land and, through

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<sup>2</sup>Following the dismissal, the United States filed an amended complaint, Union Gas filed a new third-party claim, the Commonwealth moved to dismiss and the District Court dismissed the third party claim, relying on its initial opinion. Pet. App. 81a.

the borough, also acquired easements near a creek for flood control. Pet. App. 9a, 76a-77a. In the 1950's, the State, together with the Army Corps of Engineers, dug levees, erected dikes and changed the flow of the creek to aid in flood protection. Pet. App. 77a. In October of 1980, the State again was engaged in excavation along the creek when coal tar began to seep into the water. Pet. App. 77a.

The Environmental Protection Agency (EPA) found that the coal tar was a hazardous substance thus triggering the protections of CERCLA. Pet. App. 77a. The Commonwealth in cooperation with federal authorities cleaned up the spill. Pet. App. 9a. After reimbursing the Commonwealth for its costs, the

United States sued Union Gas.<sup>3</sup> Pet. App. 9a-10a.

The District Court concluded that the third-party claim was barred by the Eleventh Amendment because CERCLA lacked clear language eliminating the States' immunity. Pet. App. 151a-152a. Following a settlement between the United States and Union Gas, Union Gas appealed dismissal of its third-party claim. Pet. App. 11a.

2. In its first opinion, the Court of Appeals agreed with the District Court. The court found in CERCLA, as it read at that time, no clear language overturning Eleventh Amendment immunity. The legislative history similarly was

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<sup>3</sup>The United States alleged that it had spent \$1,400,00 on the clean-up and sought recovery from Union Gas for \$720,000. Pet. App. 81a.

silent on the subject. The Court of Appeals affirmed.

3. Union Gas filed a petition for certiorari and soon thereafter CERCLA was amended by the Superfund Amendments and Reauthorization Act of 1986, Pub. L.No. 99-499, 100 Stat. 1613 (1986) (SARA). Eventually, the Court vacated the judgment of the Court of Appeals and remanded the case for reconsideration in light of SARA. Union Gas Co. v. Pennsylvania, No. 86-597 (January 12, 1987).

This time the Third Circuit discerned in SARA a clear Congressional intent to eliminate Eleventh Amendment immunity. Specifically, the court found that amendments to the definitional section of CERCLA, 42 U.S.C. §9601(20) (D), now made it plain that States are liable under the statute. Pet. App. 21a-23a. Aside from the language of

the amendments, the Court of Appeals found support for its conclusion in provisions eliminating the sovereign immunity of the United States and providing for citizens suits. Pet. App. 23a-28a.

Having resolved the statutory interpretation question, the Court of Appeals faced the question whether Congress had the power under the Commerce Clause to alter Eleventh Amendment protections. First, the court concluded that the extent of Congress' power to affect Eleventh Amendment immunity did not vary depending upon whether Congress was acting pursuant to its Article I powers or its power to enforce the Fourteenth Amendment. Pet. App. 66a. The court then decided that, so long as

Congress expressed itself clearly, there were no constraints on its ability to eliminate the Eleventh Amendment safeguards when it was acting under the Commerce Clause. Pet. App. 66a-67a. Finally, the court ruled that the SARA amendments could be applied retroactively because the case still was on appeal when the law was amended. Pet. App. 67a-72a.<sup>4</sup>

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<sup>4</sup>The Court of Appeals stayed the mandate pending disposition of this petition.

## REASONS FOR GRANTING THE WRIT

The decision of the Court of Appeals raises issues of substantial nationwide importance concerning the scope of liability under the Superfund Act and the nature of Congress' power to affect the States' Eleventh Amendment immunity. Despite the fact that the statute makes no mention of the Eleventh Amendment, refers to State liability only in a definitional provision and nowhere indicates clearly that Congress focused precisely on state liability to private parties, the Third Circuit has opened the States' coffers. This in itself presents immediate, serious consequences for all the States. EPA has listed 22,000 sites as potential Superfund sites, H. Rep. No. 99-253(V)(1986), p. 2, with cleanup costs estimated to

approach \$100 billion. H. Rep. No. 99-253(I) (1985), p. 55. As the amici States explain more particularly, even before the Third Circuit's decision, numerous third-party claims have been pressed against States, some as seemingly bizarre as the assertion that a State is liable for hazardous releases from a site cordoned off by police because it was the scene of a suspected crime.<sup>5</sup> This trend can be expected to intensify, encouraged by the decision in this case.

The Third Circuit's decision raises disturbing questions not only about Superfund liability, but also regarding the vitality of the Eleventh Amendment. The Court of Appeals failed

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<sup>5</sup>See United States v. Freeman, Civil Action No. 86-748-E (W.D.N.Y.), which is discussed more fully in the States' amicus brief.

to address adequately the question, posed in this case as well as a legion of others arising under CERCLA before the SARA amendments, whether the Eleventh Amendment permits Congress to sweep aside immunity retroactively. Certainly, it is of immediate importance that the question of retroactive liability be settled so that States do not incur needlessly the enormous litigation costs associated with Superfund cases.

The Third Circuit's decision is of critical importance for a final reason. The court, by refusing to recognize any substantive limits on Congress' authority to limit Eleventh Amendment immunity, has eliminated almost entirely any meaningful role for that provision. In so holding, the Court of Appeals swept aside without more than a passing glance this Court's

repeated admonition, often in the face of vigorous dissent, that the Eleventh Amendment embodies the fundamental values of sovereign immunity. This sharp break in Eleventh Amendment jurisprudence justifies review at this time.

1. Just last term the Court reaffirmed that States are immune from suit in federal court in the absence of "an unequivocal expression that Congress intended to override Eleventh Amendment immunity." Welch v. Texas Department of Highways and Public Transportation, No. 85-1716 (June 25, 1987), slip op. at 8, citing Atascadero State Hospital v. Scanlon, 473 U.S. 234, 242 (1985); Pennhurst State School & Hospital v. Halderman, 465 U.S. 89, 99 (1984); and, Quern v. Jordan, 440 U.S. 332, 342-345

(1979). The Third Circuit, although it paid lip service to this rule (Pet. App. 14a-17a), failed to heed it.

Nothing in CERCLA as originally enacted demonstrates that Congress "focused directly" on unrestricted State liability to private parties. See Hutto v. Finney, 437 U.S. 678, 698, 698 n.31 (1978). Prior to SARA, the Superfund Act made no explicit reference to the possibility of State liability to private parties. In its first opinion, the Court of Appeals held quite correctly that it was not enough to override the Eleventh Amendment for States to be literally included within the terms of a regulatory statute. Pet. App. 101a. This is particularly true where, as here, the States' inclusion subjects them to liability to the United States.

Pet. App. 104a. SARA's limited alteration of the statutory scheme should not have altered this result.

SARA makes no explicit reference to the Eleventh Amendment and does not by its terms clearly lift the bar of immunity. In fact, the plain language of the amendment on which the Court of Appeals focused makes it abundantly clear that State liability was confined to a carefully limited set of circumstances not applicable here. The amendment to CERCLA's definition of "owner or operator," is entitled "State or Local Government Limitation." (Emphasis supplied). According to the sponsor of the amendment, it was intended to narrow, not expand, the scope of State liability as it stood

under the original version of CERCLA.<sup>6</sup> See Comments of Senator Stafford, 131 Cong. Rec. 11619 (daily ed. Sept. 17, 1985).

The amendment deals entirely with the circumstances under which a State or local government can be held liable for releases from sites which the government entities acquire involuntarily. Generally, government units are not liable for releases from sites acquired unwillingly. But this "exclusion" does not apply if the government agency "caused or contributed to the release." "[S]uch a State or local government," that is, one which has cause or contributed to a release from a site acquired involuntarily, is subject to liability under the statute. 42 U.S.C. §9601(20)(D).

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<sup>6</sup>The amendment is reproduced in full on pages 2-3 of this petition.

About the only things clear from this rather convoluted definitional amendment is that it applies only to sites acquired by governments involuntarily and that it severely restricts governmental liability for releases from those sites. It says nothing about the Eleventh Amendment and it does not clearly subject States to unlimited liability to private parties. The obvious purpose of this change in law was to protect State and local governments from liability, even to the United States, if they acquired a site unwillingly. The Conference Committee's report confirms this view. H.Rep. No. 99-926, p. 185-186 (1986).

The error in the Third Circuit's interpretation of SARA becomes apparent when its implications are fully explored.

We must remember that the Court of Appeals relies entirely on the language of §101(20)(d), 42 U.S.C. §9601(10)(D), for its conclusion that States generally are liable to private parties in federal court. But the new §101(20)(D) imposes liability on State and local governments only if they "caused or contributed" to the release. This "fault" standard contrasts dramatically with the strict liability standard which CERCLA always has been understood to impose. See, e.g., State of New York v. Shore Realty Corp., 759 F.2d 1032, 1042 (2d Cir. 1985). In fact, the legislative history of SARA itself demonstrates that Congress intended for CERCLA liability to be "strict . . . . In other words, liability may be imposed without fault . . . ."

H. Rep. 99-253 (II)(1985), p. 15. The fact that Third Circuit's interpretation

of the statute would result in a standard of liability totally at odds with the one Congress plainly intended to apply is strong evidence that the court has misread the statute.

However one reads SARA one conclusion is inescapable - it hardly is a clear expression of Congressional intent to override State immunity from federal court suit. The Court should take this early opportunity to set the matter straight before substantial resources are wasted in litigation over claims for which the federal courts lack jurisdiction.

2. The events which gave rise to Union Gas' claim occurred in 1980, many years before CERCLA was amended by SARA 1986. Yet the Court of Appeals apparently had no difficulty with applying the new law retroactively. The

court analyzed (Pet. App. 67a-72a) the retroactivity question as if it were a garden variety one to be judged against the normal rule - namely, that appellate courts must apply the law in effect when the appeal is decided. See, e.g., United States v. Schooner Peggy, 5 U.S. (1 Cranch) 103, 110 (1801). But the Court of Appeals made a serious misstep when it failed to appreciate that the usual rule is inapplicable where the new law purports to eliminate pre-existing Eleventh Amendment immunity.

a. "[T]he Eleventh Amendment embodies a broad constitutional principle of sovereign immunity." Welch v. Texas Department of Highways and Public Transportation, slip op. at 16. "[T]he States, in the absence of consent, are immune from suits brought against them [in federal court]." Monaco v. Mississippi, 292 U.S. 313, 329 (1934).

The Court repeatedly has emphasized the central role of consent or waiver in Eleventh Amendment jurisprudence. See Atascadero State Hospital v. Scanlon, 473 U.S. 234, 139-240, 246 (1985); Edelman v. Jordan, 415 U.S. 651, 672 (1974); Employees v. Missouri Dept. of Public Health and Welfare, 411 U.S. 279, 280-281 n.1, 285 (1973). The Court's decisions which address federal schemes erected, like the one here, pursuant to Congress' power to regulate commerce, routinely have looked for evidence of consent or waiver.

In Parden v. Terminal Ry. Co., 377 U.S. 184 (1964), the Court concluded that the Eleventh Amendment was not a bar to federal jurisdiction under the Federal Employees' Liability Act, 45 U.S.C. §51 et seq., because

Congress conditioned the right to operate a railroad in interstate commerce upon amenability to suit in federal court as provided by the Act; by thereafter operating a railroad in interstate commerce, Alabama must be taken to have accepted that condition and thus to have consented to suit.

Id. at 192. The Court carefully explained that Congress may not at its whim make the Eleventh Amendment disappear. "It remains the law that a State may not be sued by an individual without its consent . . . Alabama, when it began operation of an interstate railway . . . necessarily consented to suit. . . ." Ibid.<sup>7</sup>

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<sup>7</sup>The particular result in Parden was overruled by Welch v. Texas Department of Highways and Public Transportation. The Court did not, however, overrule Parden's discussion of the need for State consent. The Court, instead, reserved the question. Slip op. at 6.

The idea that a Commerce Clause statute can eliminate Eleventh Amendment immunity only if a State can be said to have waived it by engaging in federally regulated conduct was reinforced in Employees of Dept. of Pub. Health & Welfare v. Missouri Dept. of Pub. Health & Welfare, 411 U.S. 279 (1972). The Court noted that Congress certainly has the power to determine that activities conducted by the States have such an effect on interstate commerce as to call for a uniform national approach. Id. at 284. But it must appear clearly "that Congress conditioned the operation of these [State] facilities on the forfeiture of immunity from suit in a federal forum." Id. at 285.

The spending power cases have a included similar analysis. The question has been viewed as one of waiver or consent - a court must satisfy itself

that Congress intended to subject States to suit in federal court and that "the State by its participation in the program authorized by Congress had in effect consented" to suit. Edelman v. Jordan, 415 U.S. 651, 672 (1974). Obviously, there can be "no knowing acceptance" by the States of conditions imposed by Congress, unless they are "cognizant of the consequences of participation." Pennhurst State School & Hospital v. Halderman, 451 U.S. 1, 17 (1981); see also Atascadero, 479 U.S. at 246-247 and n.5.

Despite this apparently uniform approach to Eleventh Amendment questions, the Court recently has declined to decide in advance of the necessity whether State consent is an integral feature of the immunity analysis in cases involving

Congress' Article I powers. First, in County of Oneida, New York v. Oneida Indian Nation of New York State, 470 U.S. 226, 252 (1985), and more recently, in Welch v. Texas Department of Highways and Public Transportation, slip op. at 6, the Court put off the question for another day. Should the Court conclude that CERCLA, as amended by SARA, provides a clear expression of Congress' intention to override the Eleventh Amendment, then the question of Congressional authority to abrogate immunity under the Commerce Clause absent State consent is squarely presented.

b. The Court of Appeals perceived the constitutional question to be "whether Congress' Article I commerce clause powers are sufficient to abrogate the states' eleventh amendment immunity."

Pet. App. 34a. But this is a misperception, for the initial constitutional issue is far narrower: whether, assuming Congressional power to eliminate Eleventh Amendment immunity in laws such as CERCLA, Congress has the power to do so retrospectively. The Court of Appeals failed to address this important question.

The Eleventh Amendment strikes a balance between the federal and state governments "[b]y guaranteeing the sovereign immunity of the States against suit in federal court ...." Atascadero State Hospital v. Scanlon, 473 U.S. at 242. While the Court of Appeals quite correctly observed that all provisions of the Constitution are of equal validity, Pet. App. 40a, the court's decision has the effect, not of reading

the Eleventh Amendment together with Article I, but of sanctioning the nullification of the Eleventh Amendment. Although the Third Circuit believed that its conclusion was necessary to give life to Congress' power to regulate commerce, Pet. App. 56a-57a, in fact, such a radical approach hardly is necessary to preserve Congress' power.

The Eleventh Amendment concepts of consent and waiver, as developed in Parden, Employees, Edelman and Atascadero, properly accommodate Congressional power exercised under Article I with the States' historic immunity. Congress, despite the Eleventh Amendment, retains the power to regulate State activities and subject the States which operate within the federally regulated domain to federal court jurisdiction. To accomplish this,

Congress must make its intentions known with unmistakable clarity. Atascadero State Hospital v. Scanlon, 473 U.S. at 243.

The clear statement rule serves two purposes. First, it insures that Congress consciously has focused on the question of State immunity and resolved it in favor of subjecting States to federal court jurisdiction. Welch v. Texas Department of Highways and Public Transportation, slip op. at 8. Secondly, consistent with "the fundamental rule of jurisprudence" "that a State may not be sued without its consent," Ex Parte State of New York No. 1, 256 U.S. 490, 497 (1921), the clear statement requirement preserves the States' freedom of choice. The States are notified that they may maintain their sovereign protection by steering clear of the federally regulated sphere; but, if they

engage in activities which Congress has chosen to regulate, the States are deemed to have consented to federal court jurisdiction. See Edelman v. Jordan, 415 U.S. at 672-673.

In this case, Pennsylvania never had a choice. The coal tar was released in 1980, but the law purporting to eliminate State immunity was not passed until 1986. By glossing over this problem, the Court of Appeals effectively has read out of the Constitution any vestige of State sovereign immunity, as that concept has been understood since the Eleventh Amendment was added to the Constitution. This departure from the course of prior decisions justifies the Court's review.

3. Should the Court reject the narrow ground for reversal discussed above, then it must confront the question

which the Court of Appeals addressed at length - what if any limitations does the Eleventh Amendment place on Congress' Article I power to regulate commerce? The Third Circuit's conclusion - that the sole function of the Eleventh Amendment is to require that Congress speak clearly when eliminating its protections - flies in the face of the Court's unwavering efforts to preserve real protection for State sovereignty. At the very least, the question is of tremendous immediate importance for all fifty States and the Federal Government alike. Review at this time is essential.

Recently, the Court, in the face of the virtual elimination of the Tenth Amendment as a source of judicially enforceable States' rights, see Garcia v. San Antonio Metropolitan

Transit Authority, 469 U.S. 528 (1985), stated in the strongest terms possible that the Eleventh Amendment continues to protect the balance of power between the States and the Federal Government which is necessary to safeguard our fundamental freedoms. Atascadero State Hospital v. Scanlon, 473 U.S. at 242. Because "the Commerce Clause . . . has grown to [such] vast proportions in its applications . . .," Employees v. Missouri Public Health & Welfare Dept., 411 U.S. at 285, it effectively writes the Eleventh Amendment out of the Constitution to conclude that, so long as Congress makes its intention clear, it can act under its Commerce Clause power to regulate virtually every facet of State government and then subject recalcitrant States to suit in federal court.

In his separate opinion in the Employees case, Justice Marshall recognized that the power of Congress to regulate commerce did not necessarily give Congress the added power to subject States to suit in federal court absent their consent. 411 U.S. at 290-298 (Marshall, J., concurring in the result). He viewed the question as involving, not some general question of immunity from regulation, "but merely the susceptibility of the States to suit before a federal tribunal. Because of the problems of federalism inherent in making one sovereign appear against its will in the courts of the other . . .," federal judicial power has been restricted to take account of the interests of federalism. Id. at 294. This analysis should have informed the

decision of the Court of Appeals and moved it to resolve the case in favor of the Commonwealth.

As Justice Marshall again observed in Employees, it is impossible to square with any reasonable notion of consent or waiver the idea that a State may be required to choose between discontinuing "vital public services" carried out by facilities in place long before the federal law was passed and submitting to suit in federal court. Id. at 296 (opinion concurring in result). This observation applies even with greater force here, where not only was the public apparatus for flood control in operation before SARA was enacted, but the specific acts allegedly giving rise to liability were completed long before the statute was put into effect.

The Third Circuit's comparison between Congress' powers under Article I and under the Fourteenth Amendment (Pet. App. 40a-47a) is inapt. This Court has held quite clearly that the Fourteenth Amendment gives Congress the power to subject unconsenting States to federal court jurisdiction. See Atascadero State Hospital v. Scanlon, 473 U.S. at 238. The Fourteenth Amendment is unique in this regard - not because it was ratified after the Eleventh Amendment - but because it operates as a direct source for restraints on State activities which infringe on individual rights. See Strauder v. West Virginia, 100 U.S. 303, 306-308 (1880). By contrast, the other powers entrusted to Congress are primarily for the purpose of protecting the federal system from State incursion. It makes sense to tell

States that they must choose either to stay out of a federally regulated sphere or consent to federal court jurisdiction; such a choice makes no sense when the concern is for protection of individuals' civil rights.

The Third Circuit's revolutionary conclusions, sweeping as broadly as they do, effectively reduce the Eleventh Amendment to a requirement for sharp draftsmanship. In so doing, the Court of Appeals has emasculated this important protection for State sovereignty. The Court should review this remarkable conclusion.

CONCLUSION

The petition for writ of  
certiorari should be granted.

Respectfully submitted,

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Date: January 21, 1988

APPENDIX

UNITED STATES COURT OF APPEALS  
FOR THE THIRD CIRCUIT

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No. 85-1177

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UNITED STATES OF AMERICA,

v.

UNION GAS COMPANY,

v.

COMMONWEALTH OF PENNSYLVANIA  
and THE BOROUGH OF STROUDSBURG  
UNION GAS COMPANY,

Appellant

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On Appeal from the United States  
District Court for the Eastern  
District of Pennsylvania  
(D.C. Civil No. 83-2456)

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Argued January 7, 1986  
Reargued Following Remand  
From the Supreme Court  
June 22, 1987

Before: WEIS, HIGGINBOTHAM,  
BECKER, Circuit Judges

(Filed November 3, 1987)

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OPINION ON REMAND  
FROM THE SUPREME COURT

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BECKER, Circuit Judge.

This appeal is before us for a second time, following remand by the Supreme Court. It presents the same ultimate question that we addressed earlier: does the eleventh amendment bar defendant-third party plaintiff Union Gas Company from suing the Commonwealth of Pennsylvania in federal court for monetary damages in an action arising under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA, or Superfund), 42 U.S.C. § 9601 et seq. (1982). See United States v. Union Gas, 792 F.2d 372 (3d Cir. 1986) (Union Gas I). In our earlier decision, we affirmed the district court's judgment determining that the eleventh amendment barred the suit. The Supreme

Court granted certiorari, vacated our earlier decision, and remanded the case "for further consideration in light of the Superfund Amendments and Reauthorization Act of 1986 [SARA], Pub. L.No. 99-499." Union Gas v. Pennsylvania, 107 S. Ct. 865, 865 (1987).

We now reverse the district court's judgment, concluding that, in contrast to the legislative language upon which we based Union Gas I, SARA provides CERCLA with the requisite unmistakably clear language needed to abrogate the states' eleventh amendment immunity.<sup>1</sup> This conclusion on specificity requires us to reach an important,

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1. Congressional "abrogation" does not refer to an impermissible attempt to override a constitutional guarantee by a

(FOOTNOTE CONTINUED ON NEXT PAGE)

difficult and controversial issue -- the power of Congress to abrogate the eleventh amendment not by the later fourteenth amendment but by the commerce power of the earlier Article I. We conclude that Congress possessed the constitutional power to abrogate the immunity and that we must apply this valid congressional enactment to the present case.

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(FOOTNOTE CONTINUED)

statutory decree. Rather, in traditional eleventh amendment parlance, abrogation refers to the ability of Congress to create a cause of action for money damages enforceable by a citizen suit against a state in federal court. See In re McVey Trucking, 812 F.2d 311, 314 n.3 (7th Cir. 1987), petition for cert. filed, 56 U.S.L.W. 3028 (U.S. July 28, 1987). The issue is thus not congressional power to legislate, but the effectiveness of a congressional grant of jurisdiction despite the eleventh amendment's limitation on Article III.

## I. FACTS AND PROCEDURAL HISTORY

Our earlier opinion, Union Gas I., set forth both the facts and the procedural history of the case in detail. See 792 F.2d at 374-75. We briefly review them here.

Predecessors of Union Gas Company owned and operated a facility that allegedly released hazardous substances at a site near Brodhead Creek in Stroudsburg, Pennsylvania. Long after the plant had been closed and dismantled, the Commonwealth of Pennsylvania, acting pursuant to an easement for flood control, excavated at the former Union Gas site and struck a large deposit of hazardous substances that began to seep into Brodhead Creek. Alerted to the seepage, the Environmental Protection Agency (EPA) ordered a clean-up, which Pennsylvania and the United States performed jointly. The United States,

expending a total of approximately \$720,000, reimbursed the Commonwealth for all of its costs.

The United States sued Union Gas in the district court for the Eastern District of Pennsylvania under CERCLA, 42 U.S.C. §§ 9604, 9607 (1982), for recoupment of costs incurred in cleaning up the Brodhead Creek spill. Union Gas, in turn, filed a third-party complaint against Pennsylvania, alleging that the Commonwealth had "negligently caused, or contributed to, the discharge" and should therefore shoulder at least part of the clean-up costs. 792 F.2d at 375. Believing that the eleventh amendment barred Union Gas' suit against it, the Commonwealth moved to dismiss, and the

district court granted the Commonwealth's motion. Subsequently, the United States and Union Gas settled the principal action and the district court dismissed the lawsuit.

Union Gas thereupon appealed the district court's dismissal of Pennsylvania as a defendant, and a divided panel of this Court affirmed.<sup>2</sup> Noting that the Supreme Court requires that "Congress must express its intention to abrogate the Eleventh Amendment in unmistakable language in the statute

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<sup>2</sup>Judge Higginbotham dissented, noting that

"[t]he basic issue is whether the [CERCLA] definitional section is sufficiently adequate in itself to find legislative intent to abrogate sovereign immunity. I think it is."

792 F.2d at 384 (Higginbotham, J., dissenting). On remand he reaffirms the views expressed therein.

itself," Atascadero State Hospital v. Scanlon, 473 U.S. 234, 243 (1985)(footnote omitted), the panel found no such unmistakable expression of intent to abrogate in CERCLA.

Union Gas petitioned for certiorari on October 8, 1986. On October 17, the President signed the SARA amendments to CERCLA. Thereafter, the Supreme Court vacated our prior opinion and judgment and remanded the case for reconsideration in light thereof.

## II. CONGRESSIONAL INTENT TO ABROGATE THE STATES' ELEVENTH AMENDMENT IMMUNITY IN SARA

The eleventh amendment provides that:

The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against

one of the United States by  
Citizens of another State, or  
by Citizens or Subjects of  
any Foreign State.

U. S. Const. amend. XI. Although the amendment does not expressly address suits against a state by its own citizens, the Supreme Court has interpreted it as embodying state sovereign immunity and has therefore constructed a presumptive bar against suits by citizens of the defendant state. See Welch v. State Department of Highways and Public Transportation, 107 S. Ct. 2941 (1987); Pennhurst State School & Hospital v. Halderman, 465 U.S. 89 (1984) (Pennhurst II); Edelman v. Jordan, 415 U.S. 651 (1974); Hans v. Louisiana, 134 U.S. 1 (1890); see also infra typescript at 27-28 (discussing extent of presumption).

A. Standards for Imputing  
Congressional Intent to  
Abrogate the Eleventh  
Amendment

In our original panel opinion, we noted that eleventh amendment immunity "can be avoided in only two ways: (a) Congress can abrogate it by providing through statute for suits against states, or (b) states can waive their sovereign immunity and consent to be sued." Union Gas I, 792 F.2d at 376 (emphasis in original). After the vacatur of our previous opinion, the Supreme Court decided Welch and noted the same two exceptions to the eleventh amendment's reach. See 107 S.Ct. at 2945-46.

We also explained in Union Gas I that, because of "the eleventh amendment's importance in maintaining the balance of power between state and federal interests," 792 F.2d at 376,

the Supreme Court requires Congress to "express its intention to abrogate the Eleventh Amendment in unmistakable language in the statute itself." Id. (quoting Atascadero State Hospital v. Scanlon, 473 U.S. at 243); see also Pennhurst II, 465 U.S. 89, 99 (1984); Quern v. Jordan, 440 U.S. 332, 342-45 (1979):

The Court has insisted that the statute, when read literally, not merely allow suits against the state, but that it do so with such specificity that it is clear that Congress consciously and directly focused on the issue of state sovereign immunity and chose to abrogate it.

792 F.2d at 376 (citations omitted).

The Supreme Court reaffirmed these principles in Welch, which emphasized that Congress can create an exception to the reach of the eleventh amendment only if it expresses its intent to do so in unmistakable language in the

statute itself. Welch overturned, at least in part, the decision in Parden v. Terminal Railway of Ala. Docks Dept., 377 U.S. 184 (1964), in which the Court had found that Congress had intended to abrogate states' eleventh amendment immunity when it enacted the Federal Employers Liability Act (FELA) and regulated "[e]very common carrier by railroad while engaging in commerce between any of the several States . . . ." 45 U.S.C. § 51 (1982). "Every common carrier," held Parden, included state-owned railroads and thus abrogated their eleventh amendment immunity. Welch explicitly overruled this holding in Parden, reinterpreting the very same provision of the FELA as it was incorporated by reference in the Jones Act.

Although our later decisions do not expressly overrule Parden, they leave no doubt that Parden's discussion of congressional intent to negate Eleventh Amendment immunity is no longer good law . . . . In subsequent cases the Court consistently has required an unequivocal expression that Congress intended to override Eleventh Amendment immunity. Accordingly, to the extent that Parden v. Terminal Railway . . . is inconsistent with the requirement that an abrogation of Eleventh Amendment immunity by Congress must be expressed in unmistakably clear language, it is overruled.

107 S. Ct. at 2948 (citations and footnote omitted).

B. CERCLA and the Eleventh Amendment

In Union Gas I, we found that the language and structure of CERCLA did not sufficiently evince Congress' intention to abrogate the states' eleventh

amendment immunity. SARA has now changed both the language and structure of CERCLA, and, as we explain below, SARA demonstrates Congress' unmistakable intent to subject the states to suit in federal court.

In Union Gas I, we acknowledged both that the liability section of CERCLA allows those who have incurred clean-up costs to sue "any person" who owned or operated the waste site for all costs incurred in the removal effort, 42 U.S.C. § 9607(a) (1982), and that the definitional section defines person to include the "United States Government, [a] State, municipality, commission, political subdivision of a State, or any interstate body." 42 U.S.C. § 9601(21) (1982). We found this language insufficient to abrogate the eleventh amendment for two reasons.

First, the inclusion of a state in the § 9601(21) definition of persons allows the United States, which does the vast bulk of clean-up work, to sue states for reimbursement under § 9607(a). We concluded that, because of the structure of CERCLA, the language that allows the federal government to sue states cannot be deemed to express Congress' unmistakable intention to abrogate the states' eleventh amendment immunity from suits by individuals against state government.<sup>3</sup> Second, we noted the significance

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<sup>3</sup>The eleventh amendment clearly permits statutes that provide for suits by the federal government against the states, see, e.g., United States v. Mississippi, 380 U.S. 128, 140-41 (1965) yet such statutes do not operate to abrogate the states' constitutional immunity from suits in federal court brought by individuals. See Employees of Dep't of Pub. Health & Welfare v. Missouri Dep't of Pub. Health & Welfare, 411 U.S. 279, 285-86 (1972).

of § 9607(g), which explicitly waives the United States' sovereign immunity.<sup>4</sup> We interpreted the existence of this explicit waiver of federal sovereign immunity as a further indication that the definitional section was insufficient, in and of itself, to subject a

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<sup>4</sup>At the time, § 9607(g) read in its entirety:

Each department, agency, or instrumentality of the executive, legislative, and judicial branches of the Federal Government shall be subject to, and comply with, this chapter in the same manner and to the same extent, both procedurally and substantively, as any non-governmental entity, including liability under this section.

42 U.S.C. § 9607(g) (1982). This waiver was amended and recodified at 42 U.S.C.A. § 9620(a)(1) (West Supp. 1987) by SARA. In order to avoid confusion, we continue to refer to that provision as § 9607(g).

state governmental body to suit, for reading CERCLA's definitional section to waive federal sovereign immunity would render § 9607(g) superfluous. We therefore reasoned that to impute to Congress the intention to abrogate states' immunity we would require a specific reference to states' immunity or some other explicit indication of abrogation. See Union Gas I, 792 F.2d at 380 ("abrogation of states' eleventh amendment immunity requires no less a showing of congressional intent than does waiver of federal sovereign immunity").

In SARA, however, Congress enacted the unmistakably clear statutory language that demonstrates its intent to abrogate the states' eleventh amendment

immunity. Section 101 of SARA, entitled "Amendments to Definitions," adds a new paragraph to CERCLA which defines "owner or operator":

The term "owner or operator" does not include a unit of State or local government which acquired ownership or control involuntarily through bankruptcy, tax delinquency, abandonment, or other circumstances in which the government involuntarily acquires title by virtue of its function as sovereign. The exclusion provided under this paragraph shall not apply to any State or local government which has caused or contributed to the release or threatened release of a substance hazardous from the facility, and such a State or local government shall be subject to the provisions of this Act in the same manner and to the same extent, both procedurally and substantively, as any nongovernmental entity, including liability under section 9607 of this title [cost recovery actions].

42 U.S.C.A. § 9601(20)(D) (West Supp. 1987)  
(emphasis supplied).

Two points of analysis support our conclusion that the amendment to § 9601 provides the requisite unmistakably clear language. First, the plain language of the statute indicates a clear intention to abrogate. Congress provided that a state "shall be subject to the provisions of this Act in the same manner and the same extent" as any nongovernmental entity. As the emphasized portion of § 9601(20)(D) demonstrates, Congress, in amending CERCLA, specifically contemplated the unique position of states in the constitutional scheme and, in certain circumstances, chose to make them liable to suit by individuals in federal court.

Second, SARA now applies exactly the same waiver to states that it applies to the federal government. The language

of the final portion of § 9601(20)(D) replicates for all practical purposes § 9607(g), which waives the sovereign immunity of the federal government. Thus, CERCLA, as amended by SARA, treats the United States and the states similarly -- enumerating both as "persons" and withdrawing the immunity from both. Even if we were to require a greater showing of congressional intent to abrogate the states' eleventh amendment immunity than is necessary to waive the federal government's sovereign immunity, see Union Gas I, 792 F.2d at 380 n.13, this higher threshold would be satisfied by SARA. SARA's definitional section, which replicates the federal waiver and which specifically contemplates the function of the states as separate sovereigns, addresses this concern.

In Union Gas I, the panel, relying on the special federal waiver section of CERCLA, believed that Congress, by explicitly waiving federal sovereign immunity in § 9607(g), demonstrated that more than enumeration in a definitional section was required to achieve governmental immunity. Although this argument based on § 9607(g) is no longer tenable, given the SARA amendments to that section, we must nevertheless grapple with the question of whether definitional language alone may express congressional intent as to abrogation. As a general matter, we believe that mere enumeration in a definitional section remains insufficient as evidence of congressional intent to abrogate. In our case, however, the definitional section contains a substantive direction that "state or local government shall be

subject to the provision of [CERCLA] in the same manner and to the same extent, both procedurally and substantively, as any nongovernmental entity including liability under section 107." 42 U.S.C.A. § 9601(20)(D)(West Supp. 1987). Although found in a definitional section, the language is not definitional in character; it far exceeds the bare enumeration we found insufficient to indicate congressional intent to abrogate in Union Gas I. On the contrary, its clear mandate, replicating the language of the federal waiver, satisfies our concerns about congressional intent to render the states amenable to suit.

A third point arises from SARA's amendment of the act's federal immunity waiver in § 9607(g). In Union Gas I, we

found that the existence of a special section waiving federal immunity indicated that Congress had given special thought to waiving federal immunity and had not given equivalent attention to the question of state immunity. Essentially we inferred that Congress, by not providing an analogous state waiver, did not intend to abrogate the eleventh amendment. This federal waiver, now codified at 42 U.S.C.A. § 9620(a)(1) (West Supp. 1987), has been amended, however, to provide that "[n]othing in this section shall be construed to affect the liability of any person or entity under sections 9606 [i.e., abatement actions] and 107 [i.e., cost recovery actions]." This amendment precludes the reading of § 9607(g) employed in Union Gas I, which construed the federal waiver "to affect the liability of" states.

The explicit abrogation of the eleventh amendment in SARA distinguishes this case from Employees of Department of Public Health & Welfare v. Missouri Department of Public Health & Welfare, 411 U.S. 279 (1972). As we noted in Union Gas I, Employees demonstrates that the statutory suggestion that states might be sued, when found in a provision separate from the one that creates the cause of action, may be insufficient to demonstrate congressional intent. Here, too, there are separate provisions concerning liability and amenability of states to suit in federal court. However, the clear congressional language provided by SARA overcomes this concern.

In Union Gas I, we did not confine our examination to the words of CERCLA. Rather, because these sections

had not by their language evinced the congressional intent to abrogate, we canvassed other areas of the statute for such an indication. Having found that Congress in SARA has now enacted clear statutory language to abrogate the states' eleventh amendment immunity in §§ 9601(20)(D), 9620(a)(1), we need not address the other areas. Even if they remain inconclusive after SARA, they do not operate to nullify the clear statutory language found in other provisions.

For example, SARA adds a citizen suit provision to CERCLA that provides for suits "against any person (including the United States and any other governmental instrumentality or agency, to the extent permitted by the eleventh amendment to the Constitution)." 42 U.S.C.A. § 9659(a)(1)(West Supp. 1987). While this provision expressly prevents abrogation of eleventh amendment immunity

in citizen suits under CERCLA, it does not operate to nullify such abrogation in § 9607 liability actions. To the contrary, its inclusion implies that CERCLA had elsewhere abrogated states' eleventh amendment immunity, but did not extend that abrogation to § 9659 citizen's suits. Congress had no reason to declare the states immune from citizens' suits unless it had abrogated the states' eleventh amendment immunity elsewhere in the act. By holding that Congress abrogated the eleventh amendment for some provisions of CERCLA, we give effect to the § 9659(a)(1) limitation on citizen's suits. See 2A Sutherland Statutory Construction § 46.06 (4th ed. 1984 rev.)("A statute should be construed so that effect is given to all its

provisions, so that no part will be inoperative or superfluous.").

Moreover, distinguishing citizens' suits from liability actions for eleventh amendment purposes makes perfect sense in light of the differing functions of the two provisions. Section 9659 suits are designed to allow citizens, acting as private attorneys general to bring civil actions to ensure effective implementation of CERCLA. Section 9706 suits, on the other hand, provide compensation for liability, and hence are more defined and circumscribed by actual harms already suffered. Therefore, it is perfectly reasonable to assume that Congress intentionally limited the reach of citizen actions but chose not to do so for liability suits.

We read the applicable Supreme Court precedent to instruct us to look

first at Congress' statutory language as the best indication of intent to abrogate the eleventh amendment; only in the absence of clear language are we to rely on the legislative history of an enactment. See Hutto v. Finney, 437 U.S. 678, 698 n.31 (1978). Although we need not rely on the legislative history of SARA because we find that the amendments have provided the requisite clear language, the legislative history supports our holding and would sustain it even were the statutory language less clear.

Originally, neither the Senate nor House version of SARA § 101(b)(1) copied the waiver language of § 9607(g) to abrogate state eleventh amendment immunity. However, the conference committee inserted language that replicated the federal waiver into the definition section, stating that its purpose was

"to clarify that if the unit of government caused or contributed to the release or threatened release in question, then such unit is subject to the provisions of CERCLA, both procedurally and substantially, as any non-governmental entity, including liability under section 107 and contribution under section 113. "H.R. Conf. Rep. No. 962, 99th Cong., 2d Sess. 185-86, reprinted in 1986 U.S. Code Cong. & Admin. News 3276, 3278-79. To the extent that the added language serves to "clarify" CERCLA, it amounts to a subsequent declaration of congressional intent that deserves great weight. Red Lion Broadcasting v. F.C.C., 395 U.S. 367, 380-82 (1969).

In sum, SARA contains statutory language that demonstrates the requisite unmistakable congressional intent to abrogate the states' eleventh amendment

immunity from suit, and SARA's legislative history corroborates this view.

### III. CONGRESSIONAL POWER TO ABROGATE THE STATES' ELEVENTH AMENDMENT IMMUNITY

Appellee Commonwealth of Pennsylvania and the amici states correctly note that, if we find that Congress has clearly indicated its intent to abrogate the eleventh amendment, we must face a constitutional issue: whether Congress' Article I commerce clause powers are sufficient to abrogate the states' eleventh amendment immunity. As Justice Marshall structured the question, abrogation concerns a two-step inquiry:

(1) did Congress . . . effectively lift the State's protective veil of sovereign immunity; and (2) even if Congress did lift the State's general immunity, is the exercise of federal judicial power

barred in the context of this case in light of Art. III and the Eleventh Amendment?

Employees, 411 U.S. at 287-88 (Marshall, J., concurring in the result); see also Edelman, 415 U.S. at 672 (inquiring into "threshold fact of congressional authorization"); cf. In re McVey Trucking, 812 F.2d 311, 314 (7th Cir. 1987) (reversing the order of this two-step inquiry), petition for cert. filed, 56 U.S.L.W. 3028 (U.S. July 28, 1987). We therefore turn to the issue of Congress' power to allow citizen suits against the states pursuant to CERCLA, despite the eleventh amendment's limitation on Article III federal jurisdiction.<sup>5</sup>

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<sup>5</sup>In Union Gas I, we first decided the statutory issue of congressional intent to abrogate. Having found no such intent, we did not need to reach

(FOOTNOTE CONTINUED ON NEXT PAGE)

The Commonwealth and amici argue that only certain types of exercise of congressional power may abrogate the eleventh amendment, and that the Constitution does not grant Congress the power to create an exception to the eleventh amendment in CERCLA. They argue that Congress may only directly abrogate the eleventh amendment when it acts pursuant to constitutional amendments passed after the eleventh. The Commonwealth and amici argue that, "because of the unique character of the Fourteenth Amendment, Congress may, through an unequivocal expression of its intent, subject an unconsenting state to a private suit in

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(FOOTNOTE CONTINUED)

the constitutional issue. See Ashwander v. Tennessee Valley Auth., 297 U.S. 288, 347 (1936) (Brandeis, J., concurring) (avoiding unnecessary constitutional issues); Siler v. Louisville & Nashville R.R., 213 U.S. 175, 193 (1909) (same).

federal court when seeking to enforce the Fourteenth Amendment." Brief of Amici at 9. According to this reasoning, the thirteenth, nineteenth, and twenty-fourth amendments would also allow Congress to limit the eleventh amendment because they (1) were ratified with an awareness of the eleventh amendment, (2) restrict the powers of states, and (3) grant authority to Congress to enact enforcing legislation.

We fully agree with the contention that Congress may override the eleventh amendment when acting pursuant to the powers enumerated above. We disagree, however, with the argument that congressional power to abrogate the eleventh amendment is limited only to those powers granted by the Constitution to Congress after the ratification of the eleventh amendment. Our reasoning is set forth below.

The Supreme Court has explicitly recognized that the fourteenth amendment grants Congress the power to subject states to suit in federal court notwithstanding the limitations of the eleventh amendment. Fitzpatrick v. Bitzer, 427 U.S. 445 (1976). Congress enacted CERCLA, however, pursuant to its Article I commerce clause power, see Hodel v. Virginia Surface Mining and Reclamation Association, 452 U.S. 264, 282 (1981); Wickland Oil Terminals v. Asarco, Inc., 654 F.Supp. 955, 957 (N.D. Cal. 1987), not its power under section five of the fourteenth amendment. We must therefore decide whether Congress may subject states to private suits in federal court when acting pursuant to its Article I commerce clause powers. This question has never been directly answered by the Supreme Court, which has chosen either

to expressly reserve the question, see County of Oneida, New York v. Oneida Indian Nation of New York State, 470 U.S. 226, 252, (1985), or to "assume, without deciding or intimating a view of the question, that the authority of Congress to subject consenting States to suit in federal court is not confined to § 5 of the Fourteenth Amendment." Welch, 107 S.Ct. at 2946. Our analysis of Congress' authority to subject states to suit under Article I requires an examination of the significance of distinctions between Article I and the fourteenth amendment, the history and language of the eleventh amendment, and the inherent protections offered to state sovereignty in the constitutional framework.

A. Article I and the Fourteenth Amendment: Must We Read the Constitution on a Timeline?

As a threshold matter, we disagree with Appellee's submission that only the amendments following the eleventh may override it. This reasoning would require that we read the Constitution on a timeline, a proposition we reject. Rather, we believe that we must interpret every provision in the Constitution in the light of the entire document. As the Supreme Court recognized long ago,

[t]he Constitution of the United States, with the several amendments thereof, must be regarded as one instrument, all of whose provisions are to be deemed of equal validity. It would, indeed, be most unfortunate if the immunity of the individual states from suits by citizens of other states, provided for in the

Eleventh Amendment, were to be interpreted as nullifying those other provisions which confer power on Congress to regulate commerce among the several states, which forbid the states from entering into any treaty, alliance or confederation, from passing any bill of attainder, ex post facto law or law impairing the obligation of contracts . . . -- all of which provisions existed before the adoption of the Eleventh Amendment, which shall exist, and which would be nullified and made of no effect, if the judicial power of the United States could not be invoked to protect citizens affected by the passage of state laws disregarding these constitutional limitations.

Prout v. Starr, 188 U.S. 537, 543 (1903); accord Richardson v. Ramirez, 418 U.S. 24, 42-43 (1974). In Billings v. United States, 232 U.S. 261, 282 (1914), the Court further recognized that "the Constitution is not self-destructive. In other words, that the powers which it confers on the one hand it does not immediately take away on the other . . . ."

Thus, even though the fourteenth amendment gives Congress the power to create causes of action that would subject a state to private suits in federal court, "[t]he fact that the Fourteenth Amendment was enacted after the Eleventh Amendment does not abrogate the latter in cases involving the former. The two amendments must be interpreted in light of each other." Townsend v. Edelman, 518 F.2d 116, 120 (7th Cir. 1975). Similarly, the Court of Appeals for the Seventh Circuit in McVey Trucking refused to accept the notion that the fourteenth amendment "repealed" the eleventh and hence rejected the premise that only post-fourteenth amendment congressional powers could serve as the basis for legislation to abrogate the amendment. 812 F.2d at 316. We, too, reject the argument that Congress may override the eleventh amendment only

under authority granted after the enactment of the eleventh amendment.

Although we recognize that Congress must act under a plenary grant of constitutional authority to abrogate the eleventh amendment, see McVey Trucking, 812 F.2d 320 (7th Cir. 1987) (citing Garcia v. San Antonio Metropolitan Transit Authority, 469 U.S. 528 (1985)), we disagree with the appellant's contention that the fourteenth amendment's grant of plenary powers to Congress is unique and thus distinguishable from Congress' plenary power to regulate interstate commerce as granted in Article I. In this matter we are persuaded by the reasoning of McVey Trucking, where the Court examined possible distinctions between the fourteenth amendment and Article I for purposes of eleventh amendment abrogation and found them untenable.

In a thorough, scholarly opinion, authored by Judge Flaum, McVey Trucking reviewed and rejected the notion that the fourteenth amendment represents an "ultra-plenary" grant of authority.<sup>6</sup> 812 F.2d at 319-23. McVey Trucking also rejected the notion that "Fitzpatrick could be read to suggest that each grant of power contained in the Constitution must be linked to a provision that, by [its] own terms' limits state authority in order for Congress, acting under that power, to create a cause of action for money damages against a state." 812 F.2d at 320 (citation omitted). The court observed that any plenary grant of power

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<sup>6</sup>Judge Flaum's opinion in McVey carefully examined the extent to which the eleventh amendment limits Congress' Article I powers and held that Congress may make states amenable to suit in federal court for money damages under the bankruptcy clause. U.S. Const. Art. I, § 8, cl. 4.

to Congress is a limitation on state authority, and that the two provisions were not distinguishable on the basis of the explicit reference to states in the fourteenth amendment. *Id.* at 321. We are convinced, as well, that the power of these two sections of the Constitution does not vary for the purposes of abrogating state immunity from suit.

We acknowledge that the Court has drawn a distinction between Article I and the fourteenth amendment in divining congressional intent.<sup>7</sup> *Hutto v. Finney* suggests something of a sliding

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<sup>7</sup>Indeed, in *Union Gas I.* we concluded that where the statutory language is lacking, the Supreme Court required "virtually overwhelming" evidence from the legislative history of congressional intent to abrogate. 792 F.2d at 378.

scale for the clarity of congressional expression of intent, depending on the source of the congressional power under which Congress is legislating. Where Congress acts pursuant to its Article I power, which "has grown to vast proportions in its applications," *Employees*, 411 U.S. at 285 (FLSA regulations), it must do so in "unmistakable language in the statute itself." *Atascadero*, 473 U.S. at 243. However, when Congress legislates pursuant to § 5 of the fourteenth amendment, "whose other sections by their own terms embody limitations on state authority," *Fitzpatrick*, 427 U.S. at 456, the standard for demonstrating congressional intent is less strict and may be supported by the legislative history alone. *Hutto v. Finney*, 437 U.S. at 698 & n.31. Although a clearer expression of intent is required for an

Article I enactment, the requirement is not because the fourteenth amendment is a stronger grant of power. Rather, congressional intent to abrogate is easier to infer from a fourteenth amendment enactment.

B. The Language and History of the Eleventh Amendment

In addressing the scope of congressional power to abrogate, an understanding of the purpose and scope of the amendment is required. Therefore, a brief review of the history of the eleventh amendment is essential.

The eleventh amendment was a reaction to the Supreme Court's decision in Chis olm v. Georgia, 2 U.S. [2 Dall.] 419 (1793), in which the Court construed Article III's extension of the judicial power over controversies "between a State

and Citizens of another State" to make states amenable to suit in federal court by citizens of another state.<sup>8</sup>

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<sup>8</sup>Scholars have argued the eleventh amendment was only intended to reach diversity jurisdiction, not federal question jurisdiction as is involved here. The point out that the problem with the Chis olm decision was not its abrogation of state immunity in general, but its abrogation in a diversity setting in which Georgia law would not have immunized the state from suit. As Professor Amar points out in Of Sovereignty and Federalism, 96 Yale L. J. 1425, 1467-72 (1987), the action in Chis olm was for assumpsit -- a state law cause of action. Historically, therefore, it may be wiser to view the eleventh amendment as a response to an Erie-type problem, rather than a problem of state sovereignty. This interpretation also explains what some have characterized as the inadvertent exclusion in the amendment of suit between state and citizens of that state. Because this category of suits is immune from federal diversity, and immune to a Chis olm-like incursion, the framers did not include it in the amendment. See id. at 1474.

(FOOTNOTE CONTINUED ON NEXT PAGE)

See Pennhurst II, 465 U.S. at 91-98; Petty, 359 U.S. at 276; McVey Trucking, 812 F.2d at 317. In swift response to this construction of Article III, Congress and the States passed the eleventh amendment to provide: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United

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We need not address the historical argument that the eleventh amendment was never intended to reach federal question jurisdiction. It is sufficient for us to note that the eleventh amendment was intended as a limitation on judicial, not congressional, power. Amar also notes that the language of the eleventh amendment stating that "the judicial power shall not be construed to" indicates that its drafters intended to restrict judicial, not congressional abrogation of sovereign immunity. Amar points out that an earlier draft of the amendment used "shall not extend," but that such language might have prevented even affirmative jurisdictional grants. Id. at 1482. This argument supports our conclusion.

States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. Const. amend. XI.

In light of the circumstances surrounding the passage of the eleventh amendment, this language has been construed to mean that courts cannot, pursuant to their Article III powers, subject states to suit. Thus, language of the amendment does not, nor was it ever intended to, limit Congress' Article I powers; rather, it limits the courts' power to construe the grant of judicial power in Article III to abrogate the state's presumptive immunity from diversity suits. See Tribe, Intergovernmental Immunities in Litigation, Taxation, and Regulation: Separation of Powers Issues in Controversies About Federalism, 89 Harv. L.Rev. 682, 693-99 (1976).

Courts have broadly extended the principles of state sovereign immunity that underlie the eleventh amendment and have applied them to cases outside the technical language of the amendment. For example, the eleventh amendment does not, by its terms, limit all Article III jurisdiction. The words of the amendment seem to limit only the diversity jurisdiction over disputes "between a State and Citizens of another State." See McVey Trucking, 812 F.2d at 317-19; Fletcher, A Historical Interpretation of the Eleventh Amendment: A Narrow Construction of an Affirmative Grant of Jurisdiction Rather than a Prohibition Against Jurisdiction, 35 Stan. L.Rev. 1033 (1983). However, in Hans v. Louisiana, 134 U.S. 1 (1890), the Court held that the eleventh amendment barred suits based on federal

question jurisdiction. That case provides an example of the breadth of application. Although the eleventh amendment does not on its face address federal question jurisdiction, the Supreme Court has instructed that "we cannot rest with a mere literal application . . . or assume that the letter of the Eleventh Amendment exhausts the restrictions upon suits against non-consenting States. Behind the words of the constitutional provisions are postulates which limit and control." Principality of Monaco v. Mississippi, 292 U.S. 313, 322 (1934).

The theory of sovereign immunity, which undergirds the eleventh amendment, has thus led the Supreme Court to fashion a presumption that a congressional enactment conferring general federal question jurisdiction

does not operate to subject states to suit. See Hans, 134 U.S. at 13; McVey Trucking, 812 F.2d at 318 ("as a sovereign, a state is presumptively immune from suit in a federal court even if the cause of action arises under federal law"). As we have discussed at length in Part I, only Congress' clearly articulated decision to subject the states to suits by private individuals in federal court operates to rebut this presumption. The presumption of immunity and the high threshold for its rebuttal animate the notion of sovereignty that underlies the eleventh amendment. Given this strong presumption, where Congress has clearly articulated its desire to abrogate the eleventh amendment, any further expansion of the eleventh amendment is unwarranted.

In sum, the language and history of the eleventh amendment provide substantial checks on the ability of the federal government to subject states to suit in federal court. First, the Supreme Court has extended the reach of the amendment, granting state immunity from suits by citizens of the same state, and from suits involving many federal questions. Second, Congress may only override the eleventh amendment when acting under a grant of plenary authority; the presumption of immunity is high, however, and the congressional exercise of a grant of plenary authority alone is not enough. Thus, where the Court has recognized congressional power to override the amendment, as in section 5 of the fourteenth amendment, the Court has required

that Congress speak with unmistakable clarity.

Such limitations on abrogation of the eleventh amendment protect state sovereignty consistent with the amendment's purposes, and limit the reach of congressional authority to override under Article I. Moreover, as we discuss in the following section, implicit in the constitutional plan are limitations on Congress' power and incentive to abrogate state sovereign immunity under Article I. As the final phase of our analysis of the question of congressional power to abrogate eleventh amendment protection under the aegis of Article I, we now consider these limitations within the framework of the constitutional design.

## C. The Constitutional Design

### 1. Checks and Balances

The eleventh amendment reflects our system of checks and balances by limiting the power to abrogate sovereign immunity to the freely elected legislative branch. This design permits the legislative branch limited power to abrogate state immunity pursuant to grants of constitutional authority, while preventing the judiciary from independently using Article III to do the same. By adopting the eleventh amendment, Congress and the states expressed their desire to limit judicial action. Congress, however, never meant to curtail its own power to limit sovereign immunity where appropriate. Indeed, holding that states maintain their immunity in the face of national

control "is inconsistent with the constitutional plan." Tribe, 89 Harv. L.Rev. at 694-95 (footnotes omitted).

This dichotomy between the power of the judiciary and the Congress is particularly significant in the area of commerce clause regulation. In this regard, it is pertinent that CERCLA is a commerce clause regulation. As Justice Brennan has stated in dissent, "judicial interpretation of our Constitution settled since the time of Mr. Chief Justice Marshall . . . postulate[s] that the Constitution contemplates that restraints upon exercise by Congress of its plenary commerce power lie in the political process and not in the judicial process." National League of Cities v. Usery, 426 U.S. 833, 857 (1976) (Brennan, J., dissenting). Justice Brennan's dissenting position,

which mirrors the majority position in the case overruled by Usery, Maryland v. Wirtz, 392 U.S. 183 (1968), has again become to be the law of the land. Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 550-52 (1985). In contrast, our system of checks and balances dictates that the unelected federal judiciary, isolated from the political pressures that inhere in the need for reelection, must be constrained by such a constitutional restriction from abrogation of sovereign immunity.

In addition, the requirement of a clear statement before Congress may override the eleventh amendment assures that congressional intent will be followed, see Peel, 600 F.2d at 1081, and serves to check judicial interpretation of statutes. See Welch, 107

S.Ct. at 2946; cf. American Fire & Casualty Co. v. Finn, 341 U.S. 6, 17 (1951) ("The jurisdiction of the federal courts is carefully guarded against expansion by judicial interpretation . . . ."). To extend the eleventh amendment to render nugatory a clear expression of congressional intent to abrogate state immunity would thwart the Constitution's plan by ignoring the representative nature of Congress.

The scope of Congress' power to abrogate the eleventh amendment under Article I is also limited by states' representation in Congress. The Congress, comprised wholly of delegates chosen by states (through their subdivisions), will respond to state needs and therefore does not require the

eleventh amendment limitation. The Supreme Court in Garcia, 469 U.S. at 550, observed that "the principal means chosen by the Framers to ensure the role of the States in the Federal system lies in the structure of the Federal Government itself." And, as Professor Tribe notes, "it has generally been recognized that the states are represented in Congress and that Congress will be attentive to concerns of state governments as separate sovereigns." Tribe, 89 Harv. L.Rev. at 695 (footnote omitted).

## 2. Federalism

Extending the eleventh amendment to prohibit congressional power to abrogate under Article I would ignore the states' representation in Congress

and their consent to diminished power implicit in their acceptance of the Constitution. The Supreme Court itself has recognized that in some situations states have given up their immunity in the constitutional plan: "States of the Union still possess[] attributes of sovereignty, shall be immune from suits, without their consent, save where there has been 'a surrender of this immunity in the plan of the convention.'" Principality of Monaco, 292 U.S. at 322-23 (quoting The Federalist No. 81 (A. Hamilton))(footnote omitted).

Thus, just as Congress acting pursuant to section 5 of the fourteenth amendment is "exercising legislative authority that is plenary within the terms of the constitutional grant . . . under one section of a constitutional amendment whose other sections by their

own terms embody limitations on state authority," Fitzpatrick, 427 U.S. at 456, so Congress acts under its Article I powers to "regulate Commerce . . . among the several States," § 8, cl. 3, and "[t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers." § 8, cl. 18. By assenting to federal authority to regulate commerce, the states necessarily surrendered their sovereignty over that area. "There was not a State in the Union, in which there did not, at that time, exist a variety of commercial regulations; . . . By common consent, those laws dropped lifeless from their statute books, for want of sustaining power that had been

relinquished to Congress." Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 11, 226 (1824).<sup>9</sup>

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<sup>9</sup>As one commentator has noted,

The commerce clause comprises, however, not only the direct source of the most important peace-time powers of the National Government; it is also, except for the due process of law clause of Amendment XIV, the most important basis for judicial review in limitation of State power. The latter, or restrictive, operation of the clause was, in fact, long the more important one from the point of view of Constitutional Law. Of the approximately 1400 cases which reached the Supreme Court under the clause prior to 1900, the overwhelming proportion stemmed from State legislation.

E. Corwin, The Constitution and What it Means Today 67 (14th ed. 1978). Hence, even where Congress has not acted, the

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Congress' authority over interstate commerce stems from the plenary powers that have been granted to our national legislature and represents a displacement of state sovereignty. See Garcia, 469 U.S. at 548-49 (citing both Art. I, § 8 and the fourteenth amendment as "sharp contraction[s] of state sovereignty"). Hence, every federal appellate court to have addressed the question has found that Congress may subject the states to suit in federal court, the eleventh amendment

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Commerce Clause restrains state actions that affect interstate commerce in a discriminatory manner. See Philadelphia v. New Jersey, 437 U.S. 617, 623-24 (1978).

notwithstanding, when acting pursuant to its plenary powers. See McVey Trucking, 812 F.2d at 328; County of Monroe v. Florida, 678 F.2d 1124, 1128-35 (2d Cir. 1982) (congressional power over extradition, Art. IV, § 2, cl. 2) cert. denied, 459 U.S. 1104 (1983); Peel v. Florida Department of Transportation, 600 F.2d 1070, 1074-82 (5th Cir. 1979) (war powers clause, Art. I, § 8, cl. 11-13); Mills Music, Inc. v. Arizona, 591 F.2d 1278, 1285 (9th Cir. 1979) (copyright and patent clause, Art I, § 8, cl. 8); Jennings v. Illinois Office of Educ., 589 F.2d 935, 937-44 (7th Cir.) (war powers clauses), cert. denied, 441 U.S. 967 (1979). We agree.

### 3. Conclusion

The constitutional scheme of checks and balances places powerful constraints, both structural and political, upon the abrogation of the states' eleventh amendment immunity. However, the participation of the states in our federal scheme has resulted in a relinquishment of state authority in the commerce area. We conclude that a constitutional grant of plenary authority to Congress, when stated with unmistakable clarity, as here, is sufficient to support legislation that subjects the states to suit in federal court. We, therefore, hold that when acting under the commerce clause to enact CERCLA and amend it with SARA,

Congress possessed the power to abrogate the eleventh amendment.<sup>10</sup>

#### IV. Retroactivity

Having found that Congress, in enacting CERCLA and SARA, (1) explicitly intended to provide for suits by a citizen against a state, and (2) had the constitutional power to so abrogate the eleventh amendment for Superfund suits, we need only decide one remaining issue. SARA's grant of jurisdiction was not effected until the amendment became law on October 17, 1986, long after the

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<sup>10</sup>Because we find that Congress lifted the states' eleventh amendment immunity at least when it enacted SARA, but see infra n. 11, we need not distinguish between court's powers to grant retroactive or prospective relief. In the absence of an eleventh amendment problem, either or both may be appropriate. See Fitzpatrick, 427 U.S. at 456-57; Peel, 600 F.2d at 1081-82.

Brodhead Creek excavation, the initiation of Union Gas' third-party complaint, and the initial appeal to us. We must therefore inquire whether SARA's jurisdictional grant controls the instant dispute.

Generally speaking, we must account for a change of law on appeal. See Poleto v. Conrail, Nos. 86-5249 & 86-5250, slip op. at 25-27 (3d Cir. 1987). We have constantly reaffirmed our obligation to "apply the law in effect when [we] resolve[] an appeal. The court will apply a statute passed after decision in the trial court if that law is a valid enactment." Danbury, Inc. v. Olive, 820 F.2d 618, 625 (3d Cir. 1987) (citing Thorpe v. Housing Authority, 393 U.S. 268, 281-82 (1969)). As Chief Justice Marshall explained almost two centuries ago,

if subsequent to the judgment and before the decision of the appellate court, a law intervenes and positively changes the rule which governs, the law must be obeyed, or its obligation denied. If the law be constitutional, . . . I know of no court which can contest its obligation.

United States v. Schooner Peggy, 5 U.S. (1 Cranch) 103, 110 (1801).

The Supreme Court has clearly held that this rule applies to statutory changes that contract the jurisdiction of the federal courts. See, e.g., Bruner v. United States, 343 U.S. 112, 116-17 ("when a law conferring jurisdiction is repealed without any reservation as to pending cases, all cases fall with the law"). It has held with equally clarity that, when a law expands the jurisdiction of the federal courts, that expansion governs cases on

direct appeal. See, e.g., Andrus v. Charlestone Stone Products Co., 436 U.S. 604, 607-08 n.6 (1978); United States v. Alabama, 362 U.S. 602, 604 (1960) (per curiam). Thus, "where Congress has expanded the jurisdiction of the courts in response to a perceived gap in a statutory judicial scheme," we are not free to ignore that jurisdictional grant when considering cases on direct appeal. Dedham Water Co. v. Cumberland Farms Dairy, Inc., 805 F.2d 1074, 1084 (1st Cir. 1986); accord Sandefur v. Cherry, 718 F.2d 682, 684-85 (1983) ("it would be wasteful to both the parties and the courts to dismiss this appeal for lack of federal jurisdiction, for it could be at once refiled").<sup>11</sup>

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<sup>11</sup>One circuit has seemingly held that Congress must have intended a jurisdictional grant to apply to cases

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Because its expansion of jurisdiction is treated like all other changes of law on appeal, SARA's amendments to CERCLA control cases pending

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pending on direct appeal. See Carlton v. BAWW, Inc., 751 F.2d 781, 787 n.6 (5th Cir. 1985) (holding that Congress intended amendments to bankruptcy jurisdiction to apply to pending cases). We note that in SARA, Congress intended the amendments to the relevant sections of CERCLA "to clarify that if the unit of government caused or contributed to the release or threatened release in question, then such unit is subject to the provisions of CERCLA, both procedurally and substantively as any non-governmental entity, including liability under section 107 and contribution under section 113." H.R. Conf. Rep. No. 962, 99th Cong., 2d Sess., reprinted in 1986 U.S. Code Cong. & Admin. News 3276, 3278-79 (emphasis added). Because Congress intended SARA to serve as a clarification of existing law, Congress apparently intended that CERCLA, even before SARA, would abrogate the states' eleventh amendment immunity. We may therefore apply to pending cases, as well as those initiated after SARA, Congress' abrogation of the eleventh amendment.

on direct appeal. We therefore find that the Commonwealth of Pennsylvania is amenable to the suit brought by Union Gas in the instant action.

V. CONCLUSION

Congress, in enacting CERCLA and amending it with SARA, provided for suits in clear and explicit statutory language evidence of its intent to allow Superfund suits by a citizen against a state. Moreover, Article I grants Congress the constitutional power to so abrogate the eleventh amendment for Superfund suits. Insofar as SARA represents a change in the law, it applies to suits pending on direct appeal. The Commonwealth of Pennsylvania thus cannot interpose the eleventh amendment to immunize it from suit by

Union Gas pursuant to CERCLA. We therefore will reverse the judgment of the district court and remand the case for further proceedings.

A True Copy:

Teste:

Clerk of the United States Court  
of Appeals for the Third Circuit

UNITED STATES COURT OF APPEALS  
FOR THE THIRD CIRCUIT

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NO. 85-1177

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UNITED STATES OF AMERICA.

v.

UNION GAS COMPANY

v.

COMMONWEALTH OF PENNSYLVANIA  
and THE BOROUGH OF STROUDSBURG

UNION GAS COMPANY,

Appellant

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On Appeal from the United States  
District Court for the  
Eastern District of Pennsylvania  
(D.C. Civ. No. 83-2456)

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Argued January 7, 1986

Before: WEIS, HIGGINBOTHAM BECKER  
Circuit Judges

(Filed JUNE 10, 1986)

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OPINION OF THE COURT

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BECKER, Circuit Judge

This appeal presents a single question: whether the eleventh amendment bars defendant-third party plaintiff

Union Gas Company from suing the state of Pennsylvania for monetary damages in an action arising under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA or Superfund), 42 U.S.C. § 9601 et seq. (1982). The district court held that the eleventh amendment was a bar to suit and dismissed Union Gas' claim against the state. We affirm.

I. THE FACTS

The relevant facts can be summarized quite briefly. Predecessors of Union Gas Company owned and operated a carburetted water gas plant proximate to Brodhead Creek in Stroudsburg, Pennsylvania between 1890 and 1948, after which the plant was dismantled. In 1953 and 1970, Union Gas sold part of its land near the creek to Pennsylvania

Power and Light Company, which in turn granted easements over the land to the Borough of Stroudsburg. In 1955, due to flooding, the state and the borough, together with the Army Corps of Engineers, dug levees, erected dikes, narrowed and deepened the creek, and redirected its flow. In early 1980, the borough assigned its easements to the state.

On October 7, 1980, the state was excavating at the creek when it struck a large deposit of coal tar that began to seep into Brodhead Creek. Alerted to the coal tar seepage, the Environmental Protection Agency (EPA) asserted that the coal tar was a hazardous substance and ordered the site to be cleaned up.<sup>1</sup> The state of Pennsylvania

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<sup>1</sup>Brodhead Creek thus had the dubious distinction of being the first Superfund site in the nation.

jointly with the federal government undertook, inter alia, to dredge the back channel of Broadhead Creek, install a slurry wall to prevent further coal tar seepage, and clean up the coal tar that had already seeped into the water. The federal government reimbursed the state for all its costs, expending approximately \$720,000 in total.

## II. INSTITUTION OF THIS SUIT

The United States brought suit in the district court for the Eastern District of Pennsylvania against Union Gas under CERCLA §§ 104, 107 (42 U.S.C. §§ 9604, 9607) for recoupment of costs of \$450,000 incurred in cleaning up the spill at Brodhead Creek.<sup>2</sup> The United

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<sup>2</sup>The United States also sought damages of \$270,000 under the Federal Water Pollution Control Act, 33 U.S.C.

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States claimed that the coal tar had been deposited into the ground near Brodhead Creek by Union Gas and its predecessors, as a by-product of their carburetted water gas processing, and that Union Gas was consequently liable for the clean up costs. Union Gas answered the complaint, denying any liability, and filed a third-party complaint pursuant to Fed. R.Civ. P. 14, naming Pennsylvania and the Borough of Stroudsburg as third-party defendants. Union Gas alleged that the state and its political subdivision had "negligently caused, or contributed to the discharge

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§§ 1321(b)(3) and (f)(2)(1982). Union Gas did not file a third-party claim with respect to these damages, however, and so they are irrelevant to this appeal.

of coal tar into Broadhead Creek" by their recent excavation and earlier construction of dikes and levees, and therefore that they should pay for the clean up.

The state, believing that the eleventh amendment barred Union Gas' suit against it, responded with motions to dismiss pursuant to Fed. R.Civ. P. 12(b)(1) and 12(b)(6).<sup>3</sup> The district

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<sup>3</sup>Independent local political subdivisions are generally not entitled to immunity, although they may, in some circumstances, be considered arms of the state and thus derive the state's eleventh amendment immunity. See Laje v. R.E. Thomason General Hospital, 665 F.2d 724, 727 (5th Cir. 1982). Because Stroudsburg did not raise an eleventh amendment defense below, and did not appear on this appeal, we reach no decision as to whether the eleventh amendment immunity would extend to Stroudsburg.

court granted the state's motion. United States v. Union Gas Co., 575 F.Supp. 949 (E.D. Pa. 1983). Shortly thereafter, the United States filed an amended complaint, virtually identical to its original complaint but with revised damage figures alleging that the United States had spent \$1,400,000 on the clean-up, of which \$720,000 was collectible from Union Gas under CERCLA. Union Gas answered and filed an amended third-party claim against the state and borough. The state again moved to dismiss, and the court granted the state's motion "for the reasons set forth in [575 F.Supp. 949]."

Approximately five months after the court's dismissal of Union Gas' amended third-party claim, the court dismissed the federal government's action against Union Gas pursuant to

rule 23(b) of the Local Rules of Civil Procedure of the Eastern District of Pennsylvania on the understanding that the United States and Union Gas had reached a settlement. Union Gas then appealed, citing as error the district court's denial of its motion to join the state as a party.

The issue before us involves a question of law, and therefore our review is plenary.

### III. ABROGATION OF ELEVENTH AMENDMENT IMMUNITY

The eleventh amendment states that:

The Judicial Power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

U.S. Const. amend. XI. Although not apparent on its face, the eleventh amendment has been interpreted as a grant of sovereign immunity to the states in federal court.<sup>4</sup> Pennhurst State School & Hospital v. Halderman, 465 U.S. 89 (1984); Edelman v. Jordan, 415 U.S. 651 (1974); Hans v. Louisiana, 134 U.S. 1 (1890). But see Green v. Mansour, \_\_\_ U.S. \_\_\_, 106 S.Ct. 423, 431 (1985) (Brennan, J., dissenting) ("the Amendment was intended simply to remove federal court jurisdiction over suits against a State where the basis for jurisdiction was that the plaintiff was a citizen of another State or an alien"); Atascadero State Hospital v. Scanlon, 105 S.Ct. 3142

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<sup>4</sup>The amendment does not speak about the amenability of states to suits in state court. When we speak in this opinion of "states' sovereign immunity," we refer only to their immunity from suit in federal court derived from the eleventh amendment.

3156-78 (1985) (Brennan, J., dissenting) (detailing history of the amendment to support the same conclusion): Gibbons, The Eleventh Amendment and State Sovereign Immunity: A Reinterpretation, 83 Colum. L.Rev. 1889 (1983)(same): Shapiro, Wrong Turns: The Eleventh Amendment and the Pennhurst Case, 98 Harv. L.Rev. 61, 67-71 (1984). The immunity can be avoided in only two ways: (a) Congress can abrogate it by providing through statute for suits against states, or (b) states can waive their sovereign immunity and consent to be sued. We are concerned here only with whether CERCLA abrogated Pennsylvania's immunity.<sup>5</sup>

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<sup>5</sup>Union Gas also claims that Pennsylvania waived its immunity, but this claim is patently without merit and

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the district court did not even consider it. United States v. Union Gas, *supra*, 575 Supp. at 950. Union Gas alleges that Pennsylvania consented to suit by (a) owning and operating a site where hazardous wastes were stored, and (b) participating with the federal government in the clean-up effort. Leaving aside the fact that Pennsylvania most likely did not know of the coal tar in the bed of Brodhead Creek and so cannot be said to have consented to anything by its purchases of property, Pennsylvania's purchase and clean-up efforts are not sufficiently emphatic to constitute a constructive waiver of its constitutional right. It would be unreasonable to infer from Pennsylvania's actions that it had waived one of its most important and longstanding constitutional rights. Cf. Edleman v. Jordan, 415 U.S. 651, 673 (1974) ("Constructive consent is not a doctrine commonly associated with the surrender of constitutional rights, and we see no place for it here."); Great Northern Life Insurance Co. v. Read, 322 U.S. 47, 54 (1944); Murray v. Wilson Distilling Co., 213 U.S. 151, 171 (1909). See generally Tribe, Intergovernmental Immunities in Litigation, Taxation, and Regulation: Separation of Powers Issues in Controversies About Federalism, 89 Harv. L. Rev. 682, 695 (1976)(suggesting

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The Supreme Court has noted the eleventh amendment's importance in maintaining the balance of power between state and federal interests. See, e.g., Atascadero, supra, 105 S.Ct. at 3147-48;

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that courts require a definitive action by states before finding waiver of sovereign immunity).

Moreover, there is a bootstrap quality to Union Gas' argument that merely by aiding in the clean-up effort Pennsylvania waived its immunity. Stripped to its essence, Union Gas is arguing that waiver is a condition precedent to participation in the clean-up. But because participation is expressly allowed by statute, 42 U.S.C. § 9604(d)(1), the imposition of the condition must be found in CERCLA itself. Thus Union Gas' waiver argument depends upon its interpretation of CERCLA -- i.e., it is an argument of abrogation, not waiver. As such the argument is superfluous, for if the abrogation argument works, then the waiver argument is irrelevant, and if the abrogation argument fails, then so does the waiver argument.

Pennhurst, supra, 465 U.S. at 99. Because this balance is central to our system of federalism, the Court has been reluctant to infer abrogation of the eleventh amendment by a federal statute that could be otherwise interpreted. In Pennhurst, for example, the Court required "an unequivocal expression of congressional intent to 'overturn the constitutionally guaranteed immunity of the several States.'" 465 U.S. at 99 (quoting Quern v. Jordan, 440 U.S. 332, 342 (1979)). In the recent Atascadero case, the Court held that "Congress must express its intention to abrogate the Eleventh Amendment in unmistakable language in the statute itself." 105 S. Ct. at 3148 (footnote omitted). See also Edelman v. Jordan, 415 U.S. 651 (1974).

Even a statute whose natural reading would allow for suits against the state -- indeed a statute for which any other reading may be awkward -- may not suffice. The Court has insisted that the statute, when read literally, not merely allow suits against the state, but that it do so with such specificity that it is clear that Congress consciously and directly focused on the issue of state sovereign immunity and chose to abrogate it.<sup>6</sup> Cf. Hutto v. Finney, 437 U.S. 678, 706 (1978)(Powell, J., concurring in part and dissenting in part)("The Court should be 'hesitant to presume congressional awareness' of Eleventh Amendment consequences of a

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<sup>6</sup>Because abrogation requires a showing of "plain intent" rather than merely "plain meaning," the dissent's focus on CERCLA's "plain meaning" misses the mark.

statute that does not make express provision for monetary recovery against the States.")(quoting SEC v. Sloan, 436 U.S. 103, 121 (1978)).<sup>7</sup>

Two cases in particular illustrate the Court's insistence on overwhelming evidence of congressional intent. In Employees of Dept. of Pub. Health & Welfare v. Missouri Dept. of Pub. Health & Welfare, 411 U.S. 279 (1972), employees of a state hospital sued for overtime pay that they claim they were entitled to under the Fair Labor Standards Act (FLSA). One section of the FLSA gave employees whose employers were covered by the FLSA a right of action against the employers to enforce the FLSA's terms. Another section

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<sup>7</sup>Justice Powell wrote for the majority in Atascadero discussed infra.

had recently been amended explicitly to include state hospitals in the class of employers regulated by the FLSA. Although these two sections appeared to allow for a suit against state governments in federal court, the Court found no abrogation of the State's immunity because there was no evidence of congressional intent on the specific issue of sovereign immunity. *Id.* at 284-85. It was also significant, the Court noted, that there was plausible interpretation of the amended section that did not require abrogation of the eleventh amendment, according to which the section empowered the Secretary of Labor to sue the state on the workers' behalf. *Id.* at 285-86.

The second illustrative case, *Atascadero, supra*, involved § 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794 (1982), which conferred a right of action upon handicapped people who were discriminated against by "any recipient of federal assistance." A plaintiff sought damages from a state hospital that received federal financial assistance, but the Court held that the inclusive language of the Rehabilitation Act notwithstanding, the eleventh amendment barred the suit:

The statute thus provides remedies for violations of § 504 by "any recipient of federal assistance." There is no claim here that the State of California is not a recipient of federal aid under the statute. But given their constitutional role, the States are not like any other class of recipients of federal aid.

A general authorization for suit in federal court is not the kind of unequivocal statutory language sufficient to abrogate the Eleventh Amendment. When Congress chooses to subject the States to federal jurisdiction, it must do so specifically.

105 S.Ct. at 3149 (emphasis added)  
(footnote omitted).

One other case deserves special mention. In Hutto v. Finney, 437 U.S. 678 (1978), the Supreme Court held that the Civil Rights Attorney's Fees Awards Act 42 U.S.C. § 1988 (1982), abrogated the eleventh amendment, thus permitting successful claimants against the state to receive attorneys' fees, even though the relevant statutory language was quite general and referred to neither the eleventh amendment nor suits against states. The Court relied on several factors, most significantly § 1988's extensive legislative history. The Court observed that both the House and

Senate Reports explicitly endorsed the payment of attorneys' fees by states,<sup>8</sup> see Hutto, 437 U.S. at 694, and that two attempts to amend the Act to immunize state and local governments from awards had been defeated. Id. The Court concluded that this evidence provided the requisite "formal indication of Congress[ional] intent to abrogate States' Eleventh Amendment immunity," id. at 697 n.27, and that it would be irresponsible to refuse to read § 1988 as an abrogation of immunity, id. at

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<sup>8</sup>The Senate Report said that "[i]t is intended that the attorneys' fees, like other items of costs, will be collected either directly from the official. . . or from the State." S.Rep. No. 94-1011, p. 5 (1976) (footnotes omitted), (1976) U.S. CODE CONG. & AD. NEWS 5908, 5913 (quoted in Hutto, 437 U.S. at 694). The House Report was even more direct: "Of course, the 11th Amendment is not a bar to the awarding of counsel fees against state governments." H.R.Rep. No. 94-1558, p. 7 n. 14 (1976)(quoted in Hutto, 437 U.S. at 694).

694. The Court was further influenced by the fact that because § 1988 "primarily applies to laws passed specifically to restrain state action," allowing the eleventh amendment to bar § 1988 suits would rob § 1988 of much of its force. *Id.* at 693-94. Finally, the Court noted the special nature of attorney's fees as costs of litigation, and thus within the traditional power and discretion of the judiciary. *Id.* at 696, 697 n.27.

There is some question whether *Hutto* stands in the wake of *Atascadero's* explicit holding that "unmistakable language in the statute itself" is the *sine qua non* of abrogation. The *Atascadero* Court did not overturn *Hutto*, however, and so we believe that it retains its precedential value. *Hutto* demonstrates that although a court may interpret a statute to abrogate states'

eleventh amendment immunity even in the absence of explicit statutory language to that effect, the evidence in favor of such an interpretation must be virtually overwhelming. This insistence on overwhelming evidence is only intensified by *Atascadero*.<sup>9</sup>

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<sup>9</sup>In *Parden v. Terminal Ry. Co.*, 377 U.S. 184 (1964), the Supreme Court held that a state that ran a railroad for profit was liable to its employees under the Federal Employers' Liability Act although that act had no mention of the eleventh amendment and its legislative history was sparse. *Parden* would thus seem to imply a lesser standard of proof for abrogation than that required by *Hutto*, and Union Gas relies upon it. The reliance is misplaced, for *Parden* has been limited to instances in which the state is engaged in a for-profit enterprise. See *Employees*, *supra*, 411 U.S. at 285. Union Gas has not suggested that Pennsylvania was engaged in such an enterprise here, and therefore *Parden* would appear to be inapposite.

Moreover, as Professor Tribe noted in 1976, the philosophy underlying *Parden* shifted significantly in the years following it, making abrogation more difficult:

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In the decade between Parden and Edelman [v. Jordan, 415 U.S. 651 (1974)], the Supreme Court's stance on the eleventh amendment has significantly shifted. Parden would make states amendable to suit in federal court whenever they undertake an activity for which a private person could potentially be held liable under a valid federal law. The Parden majority thus posited no distinction between the states and other entities that might be regulated by federal legislation. Employees and Edelman, on the other hand, understand states to be distinguished from other entities by federalism considerations. For this reason, the amenability of states to suit must be specifically addressed by federal legislation, and Congress must make its intention to treat states like private parties unmistakably clear. This policy of clear statement had been rejected by the Parden majority, but . . . eventually prevailed.

Tribe, supra, at 690-91 (footnotes omitted). See also Welch v. State Dept. of Highways & Pub. Trans., 780 F.2d 1268, 1270-73 (5th Cir. 1986)(en banc)(discussing developments in the jurisprudence since Parden). The years since Professor Tribe wrote have only confirmed and deepened the change in attitude that he identified.

This brief review provides the background for our consideration of whether CERCLA may be interpreted to abrogate the eleventh amendment.

#### IV. CERCLA AND THE ELEVENTH AMENDMENT

CERCLA, Pub. L. No. 96-510, 94 Stat. 2767 (codified in 42 U.S.C. §§ 9601-15, 9631-36, 9641, 9651-53, 9654-56, 6911-11A, 6957, and various sections of titles 26, 33 and 49), was a bold effort to meet the threat to the public health and environment posed by inactive hazardous waste sites. See H.R. Rep.No. 1016, PT. I, 96th Cong., 2d Sess, (1980), reprinted in [1980] U.S. Code Cong. & Ad. News 6119: S.Rep. No. 838, 96th Cong., 2d Sess. (1980).<sup>10</sup>

We shall not canvass the full scope of

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<sup>10</sup>The legislative history of CERCLA is exceedingly complicated because of the manner in which the bill

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that effort: we will instead review those provisions of CERCLA that are directly relevant to Union Gas' claim that CERCLA manifests Congress' intent to abrogate states' eleventh amendment immunity.

A. 42 U.S.C. § 9607 and the Definition of "Person"

CERCLA empowers the President, in coordination with the state or states in which there is a hazardous waste site emergency, to clean up the dangerous waste or take other steps necessary to

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was passed. Three bills in the Ninety-Sixth Congress contributed in some way to the legislation as finally enacted. H.R. 7020, 96th Cong., 2d Sess. (1980), H.R. 85 96th Cong., 1st Sess. (1979), and S. 1480, 96th Cong., 1st Sess. (1979). The legislative history is untangled and analyzed in Grad, A Legislative History of the Comprehensive Environmental Response, Compensation and Liability ("Superfund") Act of 1980, 8 Colum. J. Env. L. 1 (1982).

prevent the danger from escalating. 42 U.S.C. § 9604. The liability section of CERCLA, 42 U.S.C. § 9607(a), allows those who have incurred clean up costs to sue "any person" who owned or operated the waste site for all costs incurred in the removal effort. The definitional section of the statute, 42 U.S.C. § 9601, defines person as "an individual, firm, corporation, association, partnership, consortium, joint venture, commercial entity, United States Government, State, municipality, commission, political subdivision of a State, or any interstate body." 42 U.S.C. § 9601[21][emphasis added].

Union Gas argues that 42 U.S.C. §§ 9607(a) and 9601 jointly meet the clear statement requirement enunciated by the Supreme Court. The argument is straightforward: (1) § 9607(a) says that

any person who owns or operates a hazardous waste site is liable for clean-up costs; (2) the state owns the land on Brodhead Creek where the hazardous waste is deposited; (3) § 9601 says that a state is a person for purposes of CERCLA; therefore, (4) the state is jointly liable for the costs of clean-up.

Although this argument is not without force, we cannot accept it. The statutory arrangement in this case is almost identical to that in Employees of Dept. of Pub. Health & Welfare v. Missouri Dept. of Pub. Health & Welfare, 411 U.S. 279 (1972). Here, as there, the suggestion that states might be sued is found in a provision separate from the one that creates the plaintiff's cause of action. The Employees Court found

that arrangement insufficient to satisfy the burden of abrogation. Because there is no suggestion in CERCLA's legislative history that the authors of these provisions intended them to make states liable for damages, cf. Hutto v. Finney, 437 U.S. 678 (1978), we are bound by Employees to find that the inclusion of "states" within the class of potential defendants is insufficient to abrogate Pennsylvania's immunity.<sup>11</sup>

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<sup>11</sup>The dissent suggests that the "key distinction" between Employees and this case is that the inclusive language in the FLSA at issue in Employees was an amendment to the statute while there was no such "evolution" in CERCLA. Dissent Typescript at 6-7. A fair reading of Employees demonstrates, however, that it was not the fact that the statute had been amended that led the Court to its conclusion, but rather the absence of any clear indication of congressional intent to abrogate states' eleventh amendment immunity. See Employees, 411 U.S. at 283-85. There is no greater evidence of congressional intent in this case.

We would reach the same conclusion without the guidance of Employees, for there is evidence in CERCLA itself that § 9607(a) was not intended to abrogate states' sovereign immunity. The United States is included in the definition of person in § 9601 (21): therefore, if § 9607(a) were indeed an abrogation of states' sovereign immunity then that section would waive the United States' immunity as well. However, a separate CERCLA provision, § 9607(g) explicitly waives federal sovereign immunity.<sup>12</sup> This implies that § 9607(a) does not waive

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1242 U.S.C. § 9607(g) states:

Each department, agency or instrumentality of the executive, legislative, and judicial branches of the Federal Government shall be subject to, and comply with, this chapter in the same manner and to the same extent, both procedurally and substantively, as any nongovernmental entity, including liability under this section.

federal immunity, for otherwise § 9607(g) would be superfluous. See 2A Sutherland Stat. Const. § 46.06 (4th ed. 1984 rev.) ("A statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous . . ."). Since § 9607(a) treats states and the federal government identically -- and since abrogation of states' eleventh amendment immunity requires no less a showing of congressional intent than does waiver of federal sovereign immunity<sup>13</sup> -- it follows that § 9706(a) does not abrogate states' eleventh amendment immunity, either.

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<sup>13</sup>Arguably, abrogation of states' eleventh amendment immunity would require a greater showing of congressional intent than does waiver of

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Even if not read as an abrogation of state sovereign immunity, § 9607(a) still performs a meaningful function, cf. Hutto, 437 U.S. at 693-94, because it establishes a right of action by the United States against any states that own or operate hazardous waste sites. Suits by the United States against states are not foreclosed by the

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federal sovereign immunity. The difference in the burdens of proof would arise from the fact that federal sovereign immunity, unlike states' eleventh amendment immunity, arises from the common law not the Constitution. See Cohens v. Virginia, 19 U.S. (6 Wheat.) 264 (1821); Jaffe, Suits Against Governments and Officers: Sovereign Immunity, 77 Harv. L. Rev. 1 (1963) (tracing origins of doctrine in old English cases). We might therefore require greater specificity for the abrogation of state sovereign immunity than for the waiver of federal immunity. However, as that particular question is not before us here, the observations in this footnote are not part of our holding.

eleventh amendment. United States v. Mississippi, 380 U.S. 128, 140-41 (1965), but without § 9607(a) the United States would not be able to sue the states under CERCLA's generous terms.<sup>14</sup> Since the United States does not most of the initial clean-up and then sues for reimbursement, our reading leaves § 9607(a) with substantial importance.

B. Section 9607(e)(2) and Subrogation Rights

Section 9607(e)(2) states that "[n]othing in this subchapter. . . shall bar a cause of action that. . . any . . . person subject to liability under this

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<sup>14</sup>Most significantly, CERCLA allows for full recoupment of clean-up costs and strict liability. 42 U.S.C. §§ 9607(a), (c). If the United States could not sue states under CERCLA, it might be left sue each state under its own tort law.

section . . . has or would have, by reason of subrogation." Union Gas argues that this section allows it to subrogate to the rights of the United States against Pennsylvania once the United States settled its case against Union Gas. Since the United States could sue Pennsylvania, see supra Part IV.A, Union Gas argues, so should Union Gas be able to do so, through the device of subrogation.

Section 9607(e)(2) simply cannot bear the burden it must to abrogate the states' eleventh amendment sovereign immunity. That section does not even mention the eleventh amendment or suits against states. There is no evidence in the legislative history of § 9607(e)(2) that Congress intended private parties to inherit all of the rights of the United States including the right to override the states' right

not to be sued by private citizens in federal court, and we cannot ascribe such an intention to Congress.<sup>15</sup> Once again, if our refusal to read § 9607(e)(2) as an abrogation provision rendered that section meaningless or contradictory, we would have to reconsider our position. But our holding that § 9607(e)(2) does not allow private parties to sue states leaves it open for private parties to sue other private parties or the United States in the appropriate circumstances. Thus, under our reading, § 9607(e)(2) retains a significant role.

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<sup>15</sup>Union Gas cites only one case to support the proposition that a party that subrogates to the right of the United States inherits the right to sue states. Prairie State National Bank v. United States, 164 U.S. 227 (1896). That case did not contain any constitutional issues, let alone the particular issue of eleventh amendment sovereign immunity. No state was even a party in that case.

### C. CERCLA's Broad Policy

CERCLA was intended "to initiate and establish a comprehensive response and financing mechanism to abate and control the vast problems associated with. . . hazardous waste disposal sites." H.R. Rep. No. 1016, 96th Cong., 2d Sess. 22, reprinted in [1980] U.S. CODE CONG. & AD. NEWS 6119, 6125. Fastening on the word "comprehensive" in this passage and on similar expressions elsewhere of Congress' resolve to deal with hazardous waste sites with one fell swoop, see e.g., S. Rep. No. 848, 96th Cong., 1st Sess. 12 (1980)(bill "is designed to help address many of the problems faced by society as a result of chemical contamination."). Union Gas argues that Congress must have intended to abrogate states' immunity or

else CERCLA would be less than "comprehensive" and all-encompassing. The inevitable conclusion, the argument runs, is that CERCLA must be an abrogation of states' eleventh amendment immunity.

While the previous two arguments relied on the language of CERCLA itself, this one relies exclusively on CERCLA's legislative history. It therefore faces a particularly heavy burden that it is unable to bear. Not only is there nowhere near the overwhelming evidence relied upon by the Supreme Court in Hutto v. Finney, 437 U.S. at 694, but there is simply no indication anywhere in CERCLA's legislative history that Congress considered abrogating the eleventh amendment or even contemplated

CERCLA suits against states.<sup>16</sup> The declaration that a bill will deal "comprehensively" with a problem is commonplace and may be little more than political hyperbole; at all events, it does not rise to the level necessary to deprive states of their constitutional

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<sup>16</sup>The issue of states' immunity was never squarely addressed by either house of Congress in the CERCLA debates. The eleventh amendment was mentioned not once in any document or discussion pertaining to CERCLA. It can be argued that the Senate debates suggest that to the extent there was any consideration of the matter of sovereign immunity, it was thought that states would retain their immunity. Senator Randolph, for example, stated that the purpose of CERCLA liability provisions was to "provide that the funds be financed largely by those industries and consumers who profit from products and services associated with the hazardous substances which impose risks on society." 126 Cong. Rec. 30932 (Nov. 24, 1980). This statement would appear not to include states. However, this argument is not necessary to our conclusion, and we note it only in the interests of completeness.

rights. The legislative history falls far short of providing a "formal indication of Congress' intent to abrogate the States' Eleventh Amendment immunity," *id.* at 697 n.27, and Union Gas' argument from legislative history thus fails.

D. A Comparison Of CERCLA with other Environmental Statutes

CERCLA was not the first congressional effort to deal with environmental problems by creating causes of actions against polluters. The Clean Air Act, the Resource Conservation and Recovery Act (RCRA), and the Federal Water Pollution Control Act all authorize citizens' suits against polluters. In each case, the legislation specifically provides that any citizen may sue violators of the relevant statute to enforce the terms of

the act and that if the violators are states they may be sued "to the extent permitted by the Eleventh Amendment to the Constitution." See 42 U.S.C. § 7604 (1982)(Clean Air Act); 42 U.S.C. § 6972 (1982)(RCRA); 33 U.S.C. § 1365 (1982) (Federal Water Pollution Control Act).

Because CERCLA does not have an analogous provision for citizens' suits,<sup>17</sup> § 6907, which limits standing to those who have incurred response or remedial expenses in cleaning up releases of hazardous substances, is the closest analogy in CERCLA to the citizens' suit provisions of the other statutes. Union Gas points out that unlike those provisions in the other

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<sup>17</sup>There are bills currently in Congress that would amend CERCLA to allow for citizens suits. The bills are discussed *infra* at pp. 21-22.

statutes, CERCLA does not have an explicit eleventh amendment limitation and concludes that the absence of such a limitation in CERCLA is sufficient evidence that Congress intended CERCLA to abrogate the eleventh amendment.

Our answer, by now familiar, but no less applicable or correct, is that this evidence is simply insufficient to overturn the states' constitutional right to immunity. In the first place, the citizen suit provisions in the other three statutes are fundamentally different from § 9607, for whereas those provisions permit only injunctive relief to enforce the terms of each statute, § 9607 permits recoupment of clean-up expenses, an action for damages. Thus, the analogy is inexact. More fundamentally, even if

the citizen suit provisions allowed for damage remedies as does § 9607, we do not believe that the comparison between the statutes would constitute a showing of congressional intent sufficient to abrogate eleventh amendment immunity. None of the Supreme Court cases cited above, nor any other case of which we are aware in any court, has read a statute to abrogate eleventh amendment immunity on the basis of what the statute did not say. Congressional silence, except in the rarest of cases, is not unequivocal evidence of congressional intent. To interpret congressional silence as express abrogation, therefore, would be improper. See Employees, supra, 411 U.S. at 285 ("It is not easy to infer that Congress . . . desired silently to deprive the States of an immunity they have long enjoyed. . . .").

Our position is unchanged by recently proposed amendments to CERCLA that would provide for citizen suits. Both the House and the Senate have passed bills amending CERCLA in various respects. See H.R. 2817, 99th Cong., 1st Sess. (1985)(House Bill); H.R. 2005 (Senate Bill). The bills are scheduled for joint conference, and are not yet law. Among the amendments are ones analogous to the citizen suit provisions in the Clean Air Act, Federal Water Pollution Act, and RCRA, that allow citizens to bring suits against any violators of CERCLA, or against the President, to enforce compliance with CERCLA. Like those other provisions, the proposed CERCLA citizen suit provision would permit suits against states "to the extent permitted by the Eleventh Amendment." See H.R. 2817 § 150;

H.R. 2005 § 310. Union Gas argues that the facts that the proposed amendments would include the eleventh amendment limitation and that § 9607 does not include it imply that § 9607 was intended to abrogate the eleventh amendment.<sup>18</sup>

Subsequent legislation declaring the intent of an earlier statute is entitled to great weight in judicial statutory interpretation. Red Lion Broadcasting Co. v. F.C.C., 395 U.S. 367, 380-381 (1969). There is no evidence, however, to support Union Gas' contention that the proposed amendments

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<sup>18</sup>Union Gas explains: "[I]f [the proposed amendments] were to become law, it would suggest that Congress had abrogated and intended to continue the abrogation of states' Eleventh Amendment immunity as to [42 U.S.C. § 9607] suits brought by parties that have paid clean-up costs but not as to the new categories of citizen suits."

are a response to the terms or perceived meaning of § 9607. Union Gas points to no legislative history of the proposed amendments that suggests that the Congress considering the amendments thought that § 9607 abrogated the eleventh amendment and made a conscious decision to distinguish the amendments by limiting the scope of the citizens' suits. Our independent review of the legislative history has also turned up no evidence that the proposed amendments reflect the current Congress' judgment about the scope and meaning of § 9607. Without any such evidence, the amendments cannot withstand the burden of proof that abrogation demands.<sup>19</sup>

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<sup>19</sup>There is a perfectly reasonable explanation for the eleventh amendment limitations in the proposed citizen suit provisions according to which those limitations are not a response to the

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## V. CONCLUSION

We hold that CERCLA does not evidence congressional intent to abrogate states' eleventh amendment immunity. The judgment of the district court will be affirmed.

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scope of § 9607: it may be simply that the proposed CERCLA citizen suit provisions were modeled after the analogous provisions in the other environmental statutes, without regard to § 9607.

On account of the lack of evidence that the proposed amendments are a response to the current Congress' understanding of § 9607, we do not have to decide how much weight we would give the amendments if they were in fact motivated by a current legislative interpretation of § 9607. Because the proposed amendments are not yet, and may never be, law, the amendments deserve less weight than they would otherwise. Cf. Southern Community College v. Davis, 442 U.S. 397, 411 n.11 (1979) (statements of legislators or congressional committees after the enactment of a law are not entitled to the same interpretative weight as subsequent legislation).

A. LEON HIGGINBOTHAM, JR., Circuit Judge, dissenting.

When a statute in its definitional section declares unequivocally that the term "person" includes a "State, municipality, commission, political subdivision of a State, or any interstate body" 42 U.S.C. § 9601(21) (emphasis added), the explicit language of Congress should not be disregarded where there is no legislative history suggesting that Congress did not mean what they said when they used the word "state." Instead of giving Congress the presumption that they know what a state is, the majority seems to assume that judges have a better mastery and understanding of the English language than does Congress, and thus they roam through inconclusive legislative history to "demonstrate" that Congress did not mean state when they included that

specific phrase in the key definitional section of the statute. In the future, to comply with the rationale of the majority, in definitional sections of similar statutes where remedies are provided for damages citizens or corporations have suffered, Congress must use language similar to the following: "The term person includes a state, and we really mean the state, and furthermore the eleventh amendment's prohibition on suits against the states does not apply." In matters of statutory construction of legislation that is as explicit as the statute in issue, no other court has imposed as broad a reading of eleventh amendment prohibitions. I respectfully dissent.

I.

The liability section of Comprehensive Environmental Response Compensation and Liability Act (CERCLA),

42 U.S.C. § 9607, provides that ". . . any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of, . . . shall be liable for . . . any other necessary costs of response incurred by any other person consistent with the national contingency plan. . . ." 42 U.S.C. § 9607(a)(2)(B) (emphasis added). The definitional section of the statute, 42 U.S.C. § 9601, defines person as "an individual, firm, corporation, association, partnership, consortium, joint venture, commercial entity, United States Government, State, municipality, commission, political subdivision of a State, or any interstate body." 42 U.S.C. § 9601(21) (emphasis added). Inasmuch as the plain language of 42 U.S.C. §§ 9607(a)(2)(B)

and 9601(21), when read jointly, declares that a state is a person for liability purposes pursuant to CERCLA, it follows then that "states" are within the class of potential defendants liable for the costs of the clean-up. The statutory language points unambiguously to a conclusion contrary to that reached by the majority. To reach the conclusion that the word state means state one need not resort to inferences or a fortiori reasoning. One need not fill in what Justice Cardozo calls the "interstitial gaps" of legislation. Nor are we confronted with the problem that Gray so eloquently described in his Nature and Sources of the Law:

The fact is that the difficulties of so-called interpretation arise when the legislature has had no meaning at all: when the question which is raised on the statute

never occurred to it: when what the judges have to do is, not to determine what the legislature did mean on a point which was present to its mind, but to guess what it would have intended on a point not present to its mind, if the point had been present.

J.S. Gray, Nature and Sources of the Law, § 370 at 165, quoted in, B. Cardozo, The Nature of the Judicial Process 15 (1975).

## II.

The basic issue is whether the definitional section is sufficiently adequate in itself to find legislative intent to abrogate sovereign immunity. I think it is. When interpreting a statute, the starting point is of course the language of the statute itself. Consumer Product Safety Commission v. GTE Sylvania, 447 U.S. 102, 108 (1980).

If the language is clear and unambiguous, and there is no "clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive." Id.; see also Dickerson v. New Banner Institute, Inc., 460 U.S. 103, 110 (1983)(same).

In the instant case, there is no legislative history indicating that Congress considered or debated the issue of states' eleventh amendment immunity. From my view, the absence of a debate on this issue merely indicates that Congress was smart enough to know what a state is and therefore, when including states as persons who could be liable under CERCLA, Congress realized the eleventh amendment implications.

Because there is no legislative evidence as to whether Congress intended states to be inclusive or exclusive of CERCLA's liability provision, 42 U.S.C.

§ 9607, the language of the definitional section, 42 U.S.C. § 9602(21), is controlling and should be regarded as authoritative evidence of congressional intent to abrogate states' sovereign immunity. It would seem, therefore, from the clear words of the statute ("person means. . . state. . ."), that the majority should have reached a different result. Instead, the majority held that "we are bound by [Employees v. Missouri Dept. of Pub. Health & Welfare, 411 U.S. 279 (1973)] to find that the inclusion of 'states' within the class of potential defendants is insufficient to abrogate Pennsylvania's immunity."<sup>1</sup>

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<sup>1</sup>The majority also holds that "[w]e would reach the same conclusion without the guidance of Employees, for there is evidence in CERCLA itself that § 9607(a) was not intended to abrogate 'states' sovereign immunity." Maj. Typescript at 15. The majority relies

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on a separate CERCLA provision, § 9607(g), that explicitly waives federal sovereign immunity. The majority suggests that because § 9607(g) waives federal sovereign immunity, § 9607(a) does not waive federal sovereign immunity; hence, since § 9607(a) treats states and the federal government identically, § 9607(a) does not abrogate states' eleventh amendment immunity either, *Id.* at 15-16.

The majority cites no legislative history to support the weight they give to § 9607(g). At most, Congress was merely being redundant by their inclusion of a waiver of federal sovereign immunity. The redundancy is on the equivalent of demonstrating a congressional intent not to abrogate states' eleventh amendment immunity. The majority's conclusion is contrary to the familiar canon of statutory construction. Because there is no legislative history as to Congress' considering the specific problem of sovereign immunity, the court must rely on the plain language of CERCLA. The language of CERCLA contains a clear indication that Congress intended to allow private citizens to bring suits against states. In view of such clear statutory language, it does not follow that because Congress provided a specific provision abrogating federal government's immunity, Congress' failure to do the same where states are concerned evidenced a conclusive congressional intent not to lift states' sovereign immunity.

Maj. Typescript at 14. I submit that since Employees, *supra*, is patently distinguishable from the case at bar, we are not "bound" to decide this case in favor of states' immunity.

In Employees, the employees of state health facilities brought suit against the state in federal court, seeking overtime compensation due them under the Fair Labor Standards Act ("FLSA") of 1938. The question was whether the employees could sue their state employer in federal court under FLSA. The liability section of FLSA provided in relevant part:

Any employer who violates the provisions of section 6 or section 7 of this Act shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case

may be, and in an additional equal amount as liquidated damages. Action to recover such liability may be maintained in any court of competent jurisdiction...

Section 16(b) of FLSA, § 52 Stat. 1069, 29 U.S.C. § 216(b)(1938). The definitional section of FLSA read in relevant part:

"Employer" includes any person acting directly or indirectly in the interest of an employer in relation to an employee but shall not include the United States or any State or political subdivision of a State, or any labor organization (other than when acting as an employer), or anyone acting in the capacity of officer or agent of such labor organization.

Section 3(d) of FLSA, 52 Stat. 1060, 29 U.S.C. § 203(d)(1938)(emphasis added). In 1966, § 3(d) was amended by

expanding the definition of employer to include a state or a political subdivision with respect to employees "(1) in a hospital, institution, or school referred to in the last sentence of subsection (r) of this section, . . . ." Pub. L. 89-601, §102(b), 80 Stat. 831 (1966). In view of the 1966 amendment, FLSA seemingly subjected states to suit along with other employers. However, since the language in §16(b) had not been changed in 1966, the court in Employees concluded that it should not infer that Congress had removed states' immunity from suit without amending § 16(b). The court in Employees said "[i]t would also be surprising in the present case to infer that Congress deprived Missouri of her constitutional immunity without changing the old section 16(b) under which she could not

be sued or indicating in some way by clear language that the constitutional immunity was swept away." Employees, 411 U.S. at 285.

The key distinction between FLSA and CERCLA is that within the evolution of FLSA amendments there were two statutory provisions that caused an ambiguity as to the intent of Congress. In Employees, prior to 1966, there was clear statutory language indicating a congressional intent not to abrogate states' eleventh amendment immunity. But, the subsequent 1966 amendment made the earlier statutory language unclear: as to its applicability - the amended section 29 U.S.C. § 203(d)(1966) made states subject to suit under FLSA while the liability section, 29 U.S.C. § 216(b), remained the same. Read together, these sections could be rationally construed to either deny or allow

states to be subjected to suit by state employees. Thus, the evolutionary language within FLSA spawned ambiguity.

In contrast, in this case, we are not confronted with a statute which at one time declared that a person "shall not include the United States or any State or political subdivision of a State." But to the contrary, here, we have the original statute, never amended for purposes relevant to this case, that has always declared that the state was a person for liability purposes. In view of the familiar canon of statutory construction, the language of FLSA, unlike the language of CERCLA, was not authoritative evidence of clear legislative intent. Cf. Dickerson, 460 U.S. at 110 (the general rule of statutory construction is to look first to the language of

the statute and then to the legislative history if the statute is unclear).

The majority also relies on Atascadero State Hospital v. Scanlon, 105 S. Ct. 3142 (1985) in holding that CERCLA does not abrogate the eleventh amendment bar to suits against the states, Atascadero, supra, involved § 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794 (1982), which conferred a right of action upon handicapped people who were discriminated against by "any recipient of federal assistance." In Atascadero, a plaintiff sought damages from a state hospital that received federal financial assistance. The Atascadero court, noting that Congress must express its intention to abrogate the eleventh amendment in unmistakable language in the statute itself, held that the "general authorization for suit

in federal court is not the kind of unequivocal statutory language sufficient to abrogate the eleventh amendment." Atascadero, 105 S. Ct. at 3147-49.

The case at bar is distinguishable from Atascadero, supra. The statute in Atascadero provides remedies for violations of § 504 by "any recipient of federal assistance" (emphasis added). However, there was no specific statutory language identifying the class of recipients of federal aid, as in CERCLA, as "State, municipality, commission, political subdivision of a State, or any interstate body." Thus, the statute in Atascadero placed liability on a general class of potential defendants.

In the instant case, CERCLA provides that any person who owns or operates any facility at which hazardous waste is deposited is liable for the costs of the clean-up (emphasis added). In addition to the foregoing general liability provision, CERCLA further provides a specific provision identifying the class of potential defendants, i.e., person means state. See 42 U.S.C. § 9601(21). Unlike the statute in Atascadero, the statute in the case at bar does more than place liability on a general class of potential defendants. CERCLA allows states to be subjected to suit by private persons, in "unmistakable language in the statute itself."

In the case at bar, I find no ambiguity in the language of CERCLA and no contrary legislative intent. The majority, therefore, had no occasion to

"look beyond the plain language of the federal statute. . . ." Thorn v. Reliance Van Co., Inc., 736 F.2d 929, 932 (3d Cir. 1984), quoting, Aloha Airlines, Inc. v. Director of Taxation of Hawaii, 464 U.S. 7, 12 (1983). Accordingly, the definitional section of CERCLA, 42 U.S.C. § 9601(21), is controlling. CERCLA was passed with clear congressional intent, evidenced by its unambiguous statutory language, to abrogate states' eleventh amendment immunity.

### III.

As judges, we must never forget the complexity and the time constraints of the federal legislative process. Legislators do not have the time or the capacity to anticipate every possible argument that might be made subsequently by creative and clever counsel. They need not thwart every potential argument

in the womb of time by writing volumes of legislative history which say no more than that the legislature meant what they said in the statute. As Justice Cardozo once observed "[w]e do not pick our rules of law full-blossomed from the trees." B. Cardozo, supra at 103. In this case, there was a bloom of sufficient specificity for the problems with which Congress was dealing. It is particularly ironic that private parties will now be denied the right to collect millions of dollars in damages<sup>2</sup> for which they should be reimbursed because

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<sup>2</sup>The amended complaint with revised damage estimates alleges that the United States has spent \$1,400,000 on the clean up, of which \$720,000 was collective from Union Gas under CERCLA. It is the theory of Union Gas that much of the damage was caused by the state. Union Gas alleges that the state:

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the state was the party that improperly "disposed" of hazardous substances to the land and waterways of our Nation. Such a result is absurd and patently unfair when it is based on the assumption that Congress did not really mean

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. . . caused the alleged release and discharge of coal tar and oil into Brodhead Creek by their acts, omissions and/or negligence including, inter alia:

(a) The narrowing of the channel of Brodhead Creek on its western side and restriction of the channel with dikes thereby causing significant downcutting:

(b) Exacavating along the toe of the dike and backwater areas;

(c) Failing to take corrective measures to prevent the downcutting.

Appendix ¶12 at 106a-107a.

"states" although it unambiguously included states as persons liable for the harm they cause in disposing of hazardous substances.

To return to Justice Cardozo, he so wisely observed that:

[i]n countless litigations, the law is so clear that judges have no discretion. They have the right to legislate within gaps, but often there are no gaps. We shall have a false view of the landscape if we look at the waste spaces only, and refuse to see the acres already sown and fruitful.

Id. at 129. In this case, from my view the majority has failed to look at the landscape and appreciate the clear statutory language of Congress. I would reverse and remand this case to the district court for further proceedings.

A TRUE COPY:

Teste:

Clerk of the United States  
Court of Appeals for the  
Third Circuit

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA	:	
	:	
	:	CIVIL ACTION
v.	:	NO. 83-2456
	:	
UNION GAS COMPANY	:	

MEMORANDUM

BECHTLE, J.

NOVEMBER 15, 1983

The United States of America has brought suit against the Union Gas Company ("Union Gas") under sections 104 and 107 of the Comprehensive Environmental Response Compensation and Liability Act ("CERCLA" or "the Act"), 42 U.S.C. § 9604 and 9607, and section 311(b)(3) and 311(f)(2) of the Clean Water Act, 33 U.S.C. §1321(b)(3) and 1321(f)(2), for reimbursement of costs of removal and remedial action incurred in the clean-up of hazardous substances,

released from a facility allegedly owned and operated by Union Gas, into Brodhead Creek in Stroudsburg, Pennsylvania. Union Gas has filed a third part complaint under CERCLA against the Commonwealth of Pennsylvania and the Borough of Stroudsburg, alleging that the third party defendants are owners and operators of the facility in question and are therefore responsible for the release of any hazardous substances into Brodhead Creek. Presently before the court is the Commonwealth of Pennsylvania's motion to dismiss the third party complaint on the ground that jurisdiction over it is barred by the Eleventh Amendment to the United States Constitution. As set out below, the court agrees that the Eleventh Amendment bars this suit insofar as the

Commonwealth is concerned. Therefore, its motion to dismiss shall be granted.

The Eleventh Amendment to the federal Constitution embodies the doctrine of state sovereign immunity. It provides as follows:

The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

U.S. CONST. amend. XI.

Accordingly, suits against a state by citizens from either another state or a foreign state are barred. Additionally, although the amendment does not expressly address suits against a state by its own citizens, the Supreme Court has recognized that such suits are also barred. Edelman v. Jordan, 415 U.S. 651, 653 (1974)(citations omitted).

Exceptions to the states' Eleventh Amendment sovereign immunity exist in situations where either the state has consented to the filing of such a suit, Edelman v. Jordan, 415 U.S. 651 (1974); Ford Motor Co. v. Department of Treasury, 323 U.S. 459 (1945), or Congress has abrogated the states' sovereign immunity by explicit statutory mandate. Parden v. Terminal R. Co., 377 U.S. 184 (1964); Employees v. Missouri Public Health Dept., 411 U.S. 279 (1973). See Quern v. Jordan, 440 U.S. 332 (1974); Hutto v. Finney, 437 U.S. 678 (1978); Fitzpatrick v. Bitzer, 427 U.S. 445 (1976). Union Gas contends that it fits within the latter category. Union Gas claims that in enacting CERCLA, Congress effectively abrogated the states' immunity from suit by private citizens seeking indemnity for costs incurred in the clean-up of hazardous waste sites.

Union Gas's position must be considered in light of a line of Supreme Court cases, the holdings of which may be distilled into a rule which the court shall call the "clear statement rule." The principle embodied in the clear statement rule is that a state cannot be sued pursuant to the liability provisions of a federal law unless Congress provides a clear statement that it intended to abrogate the states' immunity with respect to that law. The origin of this rule may be traced to Parden v. Terminal R. Co., 377 U.S. 184 (1964), where in the Court faced, for the first time, a state's claim of immunity against suit by an individual upon a cause of action expressly created by Congress. The issue to be decided was whether a state that owned and operated a railroad in interstate commerce could successfully plead

sovereign immunity in a federal suit brought against the railroad by its employee under the Federal Employers' Liability Act ("FELA"), 45 U.S.C. §51, et seq. The Court's analysis focused on the question of whether Congress, in enacting the FELA, intended to subject a state to suit under the circumstances presented. After reviewing the terms and purposes of the FELA, the Court concluded that indeed Congress had intended to allow states to be sued under the FELA's liability provisions. The case ultimately turned on the determination that the state, by engaging itself in the railroad business for profit, had entered into an area normally occupied by private persons and corporations. It had therefore consented to be

subject to the federal regulations applicable to the railroad industry and had waived its sovereign immunity from a suit under the FELA.

The Parden decision was subsequently limited in Employees v. Missouri Public Health Dept., 411 U.S. 279 (1973), a case filed against administrative departments of the State of Missouri by state employees seeking overtime compensation allegedly due them under the Fair Labor Standards Act ("FLSA"), 29 U.S.C. §216(b). Despite express language in the Act that its coverage extended to certain state employees, the Court refused to find that Congress had lifted the sovereign immunity of the states "where the purpose of Congress to give force to the Supremacy Clause by lifting the sovereignty of the States and putting

the States on the same footing as other employers<sup>1</sup> is not clear." Id. 411 U.S. at 287. After reviewing the pertinent legislative history of the FLSA the Court concluded that if Congress intended to deprive the states of their constitutional immunity, it would not have done so silently. Since there was no "clear language" in either the statute itself or its legislative history which would indicate that the states' constitutional immunity was swept away, the Court ruled that the Eleventh Amendment barred the employees' suits against their state employer. 411 U.S. at 285.

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<sup>1</sup>The holding did not render the extension of coverage to state employees meaningless because §16(c) of the FLSA permits the Secretary of Labor to bring suit on behalf of state employees for unpaid wages.

In Edelman v. Jordan, 415 U.S. 651 (1974), the Court reversed the Seventh Circuit's holding that a state, by participating in a federal-state aid program governed by federal regulations, had "constructively consented" to a citizen's suit related to the state's administration of that program. The Edelman Court reiterated that in considering a claim of surrender of Eleventh Amendment immunity in the face of federal legislation, "we will find waiver only where stated 'by the most express language or by such overwhelming implications from the text as [will] leave no room for any other reasonable construction.'" Id. 415 U.S. at 673 (citations omitted).<sup>2</sup>

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<sup>2</sup>Following Edelman, the decisions in Fitzpatrick v. Bitzer, 427 U.S. 445 (1976); Hutto v. Finney, 437 U.S. 678

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Congressional awareness and compliance with the Supreme Court decisions setting out the clear statement rule cannot be disputed. Congress has, through clear statutory language and legislative intent enacted a number of

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(1978); and Quern v. Jordan 440 U.S. 332 (1979), have reaffirmed the principle that the "clear statement rule" is the appropriate guideline for examining claims that Congress has lifted Eleventh Amendment immunity through its enactment of particular legislation. Although these cases concern legislation passed pursuant to the Fourteenth Amendment, while the legislation at issue in Employees, Parden, and Edelman was passed pursuant to Article I, the distinction is not material insofar as the existence of the clear statement rule is concerned. See Fitzpatrick, supra, 427 U.S. at 452. Succinctly stated, the Fourteenth Amendment cases focus on whether §5 of the Fourteenth Amendment itself provides the clear statement by Congress necessary to allow abrogation of the Eleventh Amendment. Of course, such discussions assume that the clear statement rule is the starting point for the analysis.

laws effectively abrogating a state's immunity in federal court. See e.g., Parks v. Pavkovic, 536 F.Supp. 296, 309 (N.D. Ill. 1982) (Education for All Handicap Children Act of 1975 specifically intended to impose liability on states for certain education costs); Oneida Indian Nation of Wisconsin v. State of New York, 520 F.Supp. 1278, 1305 (N.D. N.Y. 1981) (intent to abrogate state immunity inferred from congressional intent, statutory language and special relationship between the Indian tribe and federal government); modified on other grounds, 691 F.2d 1070 (2d Cir. 1982); Witter v. Pennsylvania Nat'l Guard, 462 F.Supp. 299, 306 (E.D. Pa. 1978) (Vietnam Era Veterans Readjustment Act is an express authorization of federal suits against a state for back pay). Abrogation of immunity in these

cases was premised on a finding that in enacting the particular legislation at issue, Congress clearly expressed its intent to allow states to be sued. Compare Savage v. Commonwealth of Pennsylvania, 475 F.Supp. 524, 529 (E.D. Pa. 1979) (Civil Rights Act of 1871 not intended by Congress to abrogate a state's immunity (citing Quern v. Jordan, 440 U.S. 332 (1979))); Municipal Authority of Bloomsburg v Dept. of Environmental Resources, 496 F.Supp. 686, 689 (M.D. Pa. 1980)(Federal Water Pollution Control Act amendments did not abrogate the states' immunity); Stubbs v. Kline, 463 F.Supp. 110, 116 (W.D. Pa. 1978) (Rehabilitation Act of 1973 did not contain the requisite congressional intent to abrogate a state's Eleventh Amendment immunity).

Applying the clear statement rule to the facts of the present case indicates that allowance of the claim against the Commonwealth of Pennsylvania depends on a finding that Congress expressly intended to abrogate a state's sovereign immunity.<sup>3</sup> A review of the

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<sup>3</sup>In applying the clear statement rule to the present case, it should initially be noted that the Supreme Court has not yet addressed whether a state can be specifically named as a defendant in a waiver of abrogation case, where the state is being sued under a federal statute, as opposed to a consent case, where the state is being sued under state law. Cf. Alabama v. Pugh, 438 U.S. 781 (1979); Ex parte Young, 209 U.S. 123 (1908). For purposes of deciding the present motion, however this court will assume, without deciding, that a state may be specifically named as a defendant in a suit under a federal statute which abrogates the states' Eleventh Amendment immunity. Of course, a state may, on its own accord, waive its sovereign immunity. Parden v. Terminal R. Co., supra. The Third Circuit Court of

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statutory provisions and legislative history of CERCLA, however, reveals that there is no clear statement of such an intent in CERCLA.

Turning to the actual statutory provisions themselves, the court finds nothing to indicate that Congress intended to allow states to be sued by private citizens under CERCLA. Union Gas's assertion that Congress did intend to lift the states' sovereign immunity centers upon language in Section 9607

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Appeals has ruled, however, that while Pennsylvania has waived its sovereign immunity in state courts, it has not consented to suits filed in federal court. Skelan Bd. of Trustees of Bloomsburg, 669 F.2d 142, 147 (3d Cir. 1982), cert. denied, 103 S.Ct. 468 (1982).

that any "person" responsible for illegal toxic waste dumping is liable to other "persons" for cost incurred in the clean-up operation.<sup>4</sup>

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<sup>4</sup>Section 9607 provides that:

Notwithstanding any other provision or rule of law, and subject only to the defenses set forth in subsection (b) of this section --

(1) the owner and operator of a vessel (otherwise subject to the jurisdiction of the United States) or a facility,

(2) any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of,

(3) any person who by contract, agreement, or otherwise arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of hazardous substances owned or possessed by such person, by any other party or entity, at any

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facility owned or operated by another party or entity and containing such hazardous substances, and

(4) any person who accepts or accepted any hazardous substances for transport to disposal or treatment facilities or sites selected by such person, from which there is a release, or a threatened release which causes the incurrence of response costs, of a hazardous substance, shall be liable for --

(A) all costs of removal or remedial action incurred by the United States Government or a State not inconsistent with the national contingency plan;

(B) any other necessary costs of response incurred by any other person consistent with the national contingency plan; and

(C) damages for injury to, destruction of, or loss of natural resources, including the reasonable costs of assessing such injury, destruction, or loss resulting from such a release.

42 U.S.C. §9607 (emphasis added).

Section 9601(21) defines a person, for purposes of CERCLA, as "an individual, firm, corporation, association, partnership, consortium, joint venture, commercial entity, United States Government, State, municipality, commission, political subdivision of a state, or any interstate body."

Union Gas argues that, since a "person" includes a state within the meaning of CERCLA, 42 U.S.C. §9601(21), a state would be liable to a private litigant under §9607. This court cannot agree. A similar argument concerning the Fair Labor Standards Act ("FLSA") was suggested by plaintiffs and rejected by the Court in Employees v. Missouri Public Health Dept., supra, 411 U.S. 279. In Employees, the term "employers," within the meaning of FLSA, included staterun health institutions. The Supreme Court found, however, that despite this

inclusion, there was no indication of a congressional purpose to permit a citizen to sue the state in federal court. 411 U.S. at 285. The Court refused to imply such a purpose merely because the statute defined "employers" so as to include a particular state-run institution. In view of Employees, Union Gas's argument as to the combined effect of Sections 9607 and 9601(21) of CERCLA must be rejected. Any congressional waiver in CERCLA of the states' Eleventh Amendment immunity from suit must therefore be found in the statute's legislative history.

A review of the legislative background of CERCLA, however, reveals nothing to support a finding that Congress clearly expressed an intent to

abrogate a state's immunity from liability. Neither the House nor the Senate reports indicated an intent to include a governmental entity as a defendant in an action brought by a private party. The Senate debates, however, made numerous references to private companies potentially liable under CERCLA. During one of these debates, it was expressly stated that a specific purpose of the CERCLA or "Superfund" liability provisions is to "provide that the fund be financed largely by those industries and consumers who profit from products and services associated with the hazardous substances which impose risks on society." 126 Cong. Rec. S14963-64 (daily ed. Nov. 2 1980) (statement of Sen. Randolph) (emphasis added). The Senate debates further emphasized that

"[i]ssues of liability not resolved by this act, if any, shall be governed by traditional and evolving principles of common law." 126 Cong. Rec. at S14964. This court reads this last statement to include the common law doctrine of sovereign immunity embodied in the Eleventh Amendment.

In sum, since neither the statutory provisions nor the legislative history of CERCLA reveals the requisite clear statement by Congress, the inevitable conclusion to be drawn is that Congress did not intend to allow private citizens to file suit against a state under this statute. Accordingly, the Commonwealth of Pennsylvania's motion to dismiss shall be granted.

The court's Order was previously entered on October 28, 1983.

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LOUIS C. BECHTLE, J.

IN THE UNITED STATES  
DISTRICT COURT FOR THE EASTERN  
DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA	:	CIVIL ACTION
v.	:	
UNION GAS COMPANY	:	
v.	:	
COMMONWEALTH OF PENNSYLVANIA	:	
and THE BOROUGH OF STROUDSBURG	:	NO. 83-2456

ORDER

AND NOW, TO WIT, this 13th day of September, 1984, upon motion of the Commonwealth of Pennsylvania to dismiss. IT IS ORDERED that the motion is granted and the amended third-party complaint filed by the Union Gas Company is dismissed for the reasons set forth in this court's Memorandum dated November 15, 1983.

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LOUIS C. BECHTLE, J.